IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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No. _____

SILVER DOLLAR MINING CO., et al.,

Petitioners,

v.

PVO INTERNATIONAL, INC.
a California corporation and POLYTRON COMPANY,
now known as POLYCO LIQUIDATING CORPORATION,
a California corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 30, 1978

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CASES

STATUTES INVOLVED

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The Petitioners, SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEZ MINING COMPANY, an Idaho corporation; SILVER SURPRISE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARCK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation, respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on April 14, 1978, and summarily reverse the decision of the court below.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this petition.

There was no formal opinion of the District Court. The order granting the motion for Summary Judgment and Judgment of the District Court are reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the District Court was entered on May 6, 1976 (Appendix B, infra, pg. 28). The opinion of the Circuit Court (Appendix A, infra, pg. 8) was entered on April 14, 1978. The jurisdiction of this court is involked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is error for the Ninth Circuit Court of Appeals in a case founded upon diversity jurisdiction to conclude and adjudge that one joint venturer to a mining operation is an immune employer from third-party liability for contribution and indemnity under the Workmen's Compensation Act of Idaho, and the other co-venturers are not likewise so immune.

2. Whether it is error for the Ninth Circuit Court of Appeals, in a diversity case, to reject a decision of the highest Court of the State of Idaho which holds that each co-venturer in a joint venture is an employer under the Idaho Workmen's Compensation Act for all employees of the co-venturer.

3. Whether it is error for the Ninth Circuit Court of Appeals to apply a "federal interpretation" of Idaho state statutes and ignore the express state court constructions of the same statutes.

4. Whether it is error for the Ninth Circuit Court of Appeals to conclude that joint venturers, in a mining operation, have one legal status for one phase of the litigation and an exactly opposite legal status in relation to another aspect of the litigation.

5. Whether mining companies which enter into an agreement to combine their property, money, skills and knowledge to carry on a joint mining venture for profit and pay for workmen's compensation insurance are "employers" of their workers so that they are immune from liability as against a third party tortfeaser's suit for contribution and indemnification, where pursuant to Idaho mining partnership law and the parties' agreement the majority owner of the venture exercises day to day management and control of the mining operations to the exclusion of the minority owners of the venture.

STATUTES INVOLVED

Idaho Mining Partnership Law, *Idaho Code* §§ 53-402, 53-403, 54-405 and 53-410 are set out in Appendix C.

Idaho Workmen's Compensation Law, *Idaho Code* §§ 72-102(10) and 72-209 are set out in pertinent part in Appendix D.

CONCISE STATMENT OF CASE

Petitioners, as joint venturers with Sunshine Mining Company and their surety, paid 1.79 million dollars under the Idaho Workman's Compensation Act to the heirs and the estates of 91 miners and to other injured miners, as a result of the Sunshine Mine fire which occurred on May 2, 1972, near Kellogg, Idaho. Respondents manufactured polyurethane foam which was placed in the mine and which is alleged to have proximately caused the severity of the fire in question. The injured miners and the deceased miners' heirs and estates filed suits against respondents for damages. Additionally, Sunshine Mining Company and its insurance carrier filed actions against respondents, seeking to recover for the property damage and loss of profits suffered by the mine as the result of the fire. Respondents then filed third-party complaints in all their actions seeking contribution and indemnification from petitioners which own mining claims in the Sunshine Mine complex.

The Petitioners moved for summary judgment on all counts in the Idaho District Court. As to the wrongful death claims, Petitioners argued they are employers and thus immune from tort liability under the exclusive remedy provisions of the Idaho Workmen's Compensation Law and were a joint venture under Idaho mining partnership law. In the property damage action, Petitioners argued that their interests are so closely allied with those of Sunshine Mining Company that they should be treated as plaintiffs along with the miners heirs and estates and not third-party defendants.

The Idaho District Court granted Petitioners' motions for summary judgment on the wrongful death claims, stating that Petitioners were immune from liability under Idaho Workmen's Compensation Law because they were a joint venture, thereby making each member of the venture a direct employer. The district court further granted petitioner's motion for summary judgment on the property damage claim of Sunshine Mining Company on the ground that Petitioner's interests are so closely

allied with those of Sunshine Mining Company that they should be treated as plaintiffs and not third-party defendants.

The Ninth Circuit affirmed the district court's decision on the property damage claim, ruling that the petitioners stood in the same position as the original plaintiff, Sunshine Mining Company; but reversed the district court on the wrongful death claims finding only one employer because a majority of the control and management of the venture was in the hands of one of the joint venturers, Sunshine Mining Company. Thus, the Ninth Circuit held the Petitioners had the status of employers for purposes of suing for property damage, but were not employers for purposes of a third party claim for indemnity and contribution.

REASONS FOR GRANTING WRIT

The basic reason this Court should grant certiorari to review or summarily reverse this case is that the Ninth Circuit has failed to follow Idaho statutes and case law in deciding this case. The case involves the interpretation of Idaho's mining partnership law and Workmen's Compensation Law to determine if all joint venturers in a mining operation are or are not employers. The circuit court has decided that members of a joint venture who pay workmen's compensation premiums and ultimate compensation claims are not "employers" under Idaho Workmen's Compensation law if they do not have substantially equal rights in the management and control of the venture. The decision of the circuit court is contrary to the statutes of the state of Idaho and the decisional authority of the Idaho Supreme Court and decisions within other state courts whose workmen's compensation laws parallel the state of Idaho's.

The Idaho Supreme Court has ruled in *Clawson v. General Insurance Company of America*, 90 Idaho 424, 412 P.2d 597 (1966), that a joint venture is not a distinct legal entity apart from the parties composing it, and that for purposes of the workmen's compensation laws, the employees of the venture are the employees of each individual member of the venture. As joint employers, the members of the venture are liable for workmen's compensation awards, but once having paid those awards, the individual members are immune from any further liability. Members of a joint venture may, by agreement, have unequal control and management of the venture, or they may place the entire control and management of the venture in the hands of one of the joint venturers. *Eagle Star Insurance Company v. Bean*, 134 F.2d 755 (9th Cir. 1943); *Vicioso v. Watson*, 325 F. Supp. 1071 (C.D. Calif. 1971); *James Weller, Inc. v. Hansen*, 517 P.2d 1110 (Arix. 1973); *Fullerton v. Kaune*, 72 NM 201, 382 P.2d 529 (1963); *Nels E. Nelson, Inc. v. Tarman*, 163 Cal. App. 2d 714, 329 P.2d 953 (1958); *In Re McAnnely's Estate*, 127 Mont. 158, 258 P.2d 741 (1953) *Idaho Code* § 53-410

If this Court upholds the decision of the circuit court, an impossible situation arises with respect to mining partnerships in the State of Idaho. Mining partnerships are created by law, regardless of any expressed agreement to the contrary by the parties to become partners, and the relationship "arises from the ownership of shares or interest in the mine in working the same for the purposes of extracting the minerals therefrom." *Idaho Code* § 53-402. Members of a mining partnership share in the profits and losses in proportion to the interest they own in the mine, *Idaho Code* § 54-403, and the mining ground work by the partnership is partnership property, *Idaho Code* § 53-405. The member owning a majority interest in the mining partnership can control the methods of operating the mine. *Idaho Code* § 53-410.

Petitioners maintain that the decision of the district court should be upheld. The district court held that Petitioners/joint venturers in a mining enterprise are employers as defined in the Idaho Workmen's Compensation Law. *Idaho Code* § 72-102(10). As employers, the Petitioners are entitled to the protection of the statutory bar which prevents third party tort feasors (Respondents) from suing employers for contribution or indemnity. The statutory bar against suing employers is not limited. It bars all types of actions against employers including suits for property damage, personal injury and wrongful death. Petitioners contend that construing Idaho's mining partnership law in conjunction with Idaho's Workmen's Compensation Law results in the following scenario:

1. Idaho's mining partnership law creates a partnership regardless of the parties intent. *Idaho Code* § 53-402.
2. Idaho law requires workmen's compensation insurance for employees. *Idaho Code* § 72-209.
3. Idaho mining partnership law gives management and control of the venture through the party owning a majority interest in the mine. *Idaho Code* § 53-410.
4. Each member of the venture pays for compensation benefits to injured employees. *Clawson v. General Insurance Company of America*, 90 Idaho 424, 412 P.2d 597 (1966); *Idaho Code* § 72-209.

5. Idaho law provides that the employers shall be immune from liability for contribution or indemnity from third party tort feasers. *Idaho Code* § 72-209.

6. Idaho law provides that members of a joint venture are each employers under the workmen's compensation statutes. *Clawson v. General Insurance Corporation of America*, 90 Idaho 424, 412 P.2d 597 (1966)

Thus, Petitioners, as members of a joint venture, should be protected against third-party actions against the joint venturers when the joint venturers have already paid workmen's compensation premiums and benefits to their employees and employees families.

However, the circuit court, in its opinion, disregards Idaho law and holds that the minority owners of the mine are not immune from liability for contribution or indemnity. Such a decision leaves both a majority and a minority owner of the mine liable for workmen's compensation insurance, under Idaho law, but gives the minority owner no protection which thereby creates a double and unlimited liability for the minority mining partners of the joint venture. Petitioners as the minority members of the Sunshine Mining Company, now must, by law, pay workmen's compensation premiums and benefits, and if liable, pay damage claims to third-party tortfeasors.

Furthermore, the court of appeals ruled, in the property damage claim, that Petitioners stand in the same position as the Sunshine Mining Company as plaintiffs. Yet, the court, in the same opinion, states that Petitioners stand as defendants in the wrongful death action. It is difficult to comprehend that joint ventures, in a mining operation, have one legal status for one phase of the litigation and an exactly opposite legal status in relation to another aspect of the litigation. It seems aparent that if the extent of control over the mine is irrelevant in a property damage suite, the same result must attach to the wrongful death cause of action.

To summarize, the statutes and case law of Idaho point to only one conclusion: that members of joint mining ventures in Idaho are employers for all purposes. The Ninth Circuit has rejected Idaho's law and held that Petitioners are not employers for purposes of an indemnity and contribution suit brought against Petitioners by third-parties. Because this case is founded upon diversity of citizenship, the Ninth Circuit's opinion is erroneous.

CONCLUSION

For the reasons stated, we pray this Court summarily reverse the decision of the court below or in the alternative, grant a writ of certiorari. Summary reversal is consistent with this Court's practice in cases not only where the law is settled by a prior decision (e.g. *Allegheny Corporation v. Breswick & Company*, 355 U.S. 415 (1958), *United States v. Palletz*, 330 U.S. 812 (1947), and four subsequent cases summarily reversed on the authority thereof reported in *United States v. Wheelbarger*, 331 U.S. 791 (1947), but also where the action of the lower court was clearly improper. *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *White v. Howard*, 347 U.S. 910 (1954); *Franklin v. Jonco Aircraft Corporation*, 346 U.S. 868 (1953); and *Riss & Company v. United States*, 342 U.S. 937 (1952).

Respectfully submitted,

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June 30, 1978

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN HOUSE, et al.,
Plaintiffs,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants.
No. 75-3079

HELEN HOUSE, et al.,
Plaintiffs-Appellants,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
UNITED STATES OF AMERICA,
Defendant-Appellee.
No. 76-1788

HELEN HOUSE, et al.,
Plaintiffs,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, also known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.
No. 76-2650

SANDRA NORRIS, et al.,
Plaintiffs,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
UNITED STATES OF AMERICA,
Defendant-Appellee.
No. 76-1789

SANDRA NORRIS, et al.,
Plaintiffs,
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, now known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.
No. 76-2650

ARJVELL E. FOWLER,
Plaintiff.
vs.
MINE SAFETY APPLIANCES COMPANY, a corporation, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, also known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.

SUNSHINE MINING COMPANY, a corporation,
Plaintiff.
vs.
UNITED STATES OF AMERICA, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, also known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.

No. 76-2650

ANTHONY CHARLES VANIER HARDEN, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants,corporation, et al.,
Defendants,
and
PVO INTERNATIONAL, INC., a California corporation and POLYTRON COMPANY, also known as POLYCO LIQUIDATING CORPORATION, a California corporation,
Respondents,
vs.
SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; et al.,
Petitioners.

No. 76-2650

OPINION

Appeal From the United States District Court
for the District of Idaho

Before: WALLACE and SNEED, Circuit Judges, and
BOLDT,* District Judge.

SNEED, Circuit Judge:

These consolidated appeals come to us out of the litigation arising from the Sunshine Mine fire on May 2, 1972, in Kellogg, Idaho, in which over 90 miners died. The initial plaintiffs in this complex litigation were surviving relatives of those miners killed in the fire. Named as defendants in this wrongful death action were the United States, a number of companies involved in the manufacture and sale of a kind of polyurethane foam used in the mine, and others involved in the manufacture and use of self-rescue units used in the mine. Among these defendants were Polytron and PVO International, Inc., manufacturers of polyurethane foam. So far as the record reveals the Sunshine Mining Company was not named as a defendant in this initial suit.

After this initial suit had been filed, other suits were also instituted. Among these additional filings was a suit by Sunshine Mining Company, as plaintiff, seeking to recover for property damage to the mine and loss of profits. Another suit was brought on behalf of several insurance companies seeking recovery of moneys paid to Sunshine Mining Company for the property damage suffered in the fire. Included among the defendants in these suits were PVO and Polytron. These actions were then consolidated with the original wrongful death action.

PVO and Polytron then filed third party complaints in all the consolidated actions against eight small mining companies associated with the Sunshine Mining Company, seeking contribution or indemnity from them if PVO and Polytron should be found liable. These eight small companies, who were not named as defendants in any of the original actions, will be referred to as third-party defendants.

The District Court has jurisdiction of the actions against the United States by virtue of 28 U.S.C. § 1346. Diversity of citizenship is the basis of the federal court jurisdiction over the other causes of action. 28 U.S.C. § 1332.

*Hon. George H. Goldt, Senior United States District Court Judge, for the District of Washington, sitting by designation.

On this appeal we must decide whether 60 plaintiffs were properly dismissed from the action against the United States for failure to comply with the administrative claim requirement of the Federal Tort Claims Act and whether summary judgment was properly entered in favor of the third-party defendants who claimed the benefit of the immunity clause of the Idaho Workmen's Compensation Act. Our resolution of these issues requires that we affirm in part, reverse in part, and remand in part.

I.

Administrative Claim Requirement.

The complaint against the United States charges that the United States Department of the Interior, Bureau of Mines, was negligent in inspecting and enforcing safety standards at the Sunshine Mine. Suit was brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., (FTCA), which is a waiver of sovereign immunity in those cases "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occured." 28 U.S.C. § 1346(b).

The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States for money damages for . . . death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency in writing . . . " 28 U.S.C. § 2675(a). The Ninth Circuit has explicitly held that this administrative claim requirement is jurisdictional in nature and cannot be waived. *Blain v. United States*, 552 F.2d 289 (9th Cir. 1977). Therefore, unless we find that proper administrative claims were filed for the 60 plaintiffs before us on this appeal, the order of dismissal must be upheld.

A. Facts.

A document labeled "Notice of Claim" was filed with the Department of Interior by Jack Ormes, an attorney, on December 29, 1972. This document set forth a description of the accident and the alleged negligence of the Bureau of Mines. In addition, specific claims for $1,000,000 in damages per family were made on behalf of certain named members of the families of 50 of the miners. This Notice of Claim was signed by Mr. Ormes. After this document was received, the Department of the Interior

requested that a Standard Form 95 (SF 95) be filed for each claimant. A single SF 95 was prepared for each family, with the surviving spouse and children listed in space #2 labeled "Name of Claimant." A line was drawn through the rest of the form. At the bottom of each form were was a notation reading "See Notice of Claim submitted by Jack R. Ormes, Attorney at Law." Most of the SF 95s were signed by the surviving widow, though some were signed by Mr. Ormes. Attached to some of the SF 95s were survivors lists, containing the names of all family members, including some adult children who were not listed in the claimant space on the form itself.

After the Notice of Claim had been filed, other families apparently contacted Mr. Ormes. SF 95s were filed for these additional families. Again, the form was left blank except for the name of the claimants and the notation to "See Notice of Claim submitted by Jack R. Ormes, Attorney at Law." However, the Notice of Claim contained no mention of either the decedent of any of these claimants or any of the claimants themselves.

Since no action was taken on these claims by the Department of the Interior within the six month time period specified by 28 U.S.C. § 2675, the claimants were justified in treating this inaction as a final denial of their claims. Complains were then filed in the United States District Court for the District of Idaho. The list of plaintiffs included some persons who were not included on either a SF 95 or the Notice of Claim and some who were listed on only one of these documents. In two separate motions the government requested that 60 plaintiffs be dismissed because of their alleged failure to file proper administrative claims. The District Court granted this motion.

Appellants, the 60 plaintiffs dismissed from the suit against the United States, can be grouped into five categories. The first and largest group (Group 1) consists of those appellants listed on a SF 95 as a claimant or survivor, but whose families are not listed on the Notice of Claim.[1] The second group (Group 2) consists of

[1] Evelyn Anderson, Gerald Anderson, Ronald Anderson, Mahaley Birchett, Timothy Birchett, Joretta Birchett, Marshall Birchett, Billy Birchett, Loretta Birchett, Patricia Castell, Kerry Casteel, Sherri Casteel, Betty Lou Goff, Rose Ann Goff, Dorothy Johnson, Lynnel Johnson, Paula Stevenson, Sandra Norris, Christine Norris, Carey Norris, Freda Peterson, Dustin Peterson, Janice Rossiter, Tina Rossiter, Mary Ann Russell, Kenneth Russell, Shawn Russell, Scott Russell, Molisa Salyer, Yvonne Walty, Deborah Walty, Denise Walty, William Walty, Jr.

those appellants who were named neither in the Notice of Claim nor a SF 95, but whose mothers filed a SF 95.[2] The third category (Group 3) is composed of two people who were listed only as survivors on a SF 95 filed by their respective mothers, and whose mothers were listed on the Notice of Claim.[3] A fourth group (Group 4) consists of those individuals who were listed on the Notice of Claim, but who never filed a SF 95.[4] A final group (Group 5) consists of children listed as claimants on a SF 95, whose mothers are listed on the Notice of Claim.[5]

B. Incorporation by Reference.

Group 1 is seeking to use the doctrine of incorporation by reference to establish that they filed complete administrative claims. The SF 95s filed by Group 1 appellants contained only the names and the notation to "See Notice of Claim." Unless the incorporation of the Notice of Claim is effective, these claims are clearly incomplete.

We agree with Group 1 appellants that incorporation by reference can be used in presenting an administrative claim. *See Molinar v. United States*, 515 F.2d 246, 249 (5th Cir. 1975). There is no requirement that an administrative claim be presented solely on a SF 95. Rather, the regulations explicitly allow "an executed Standard Form 95 or other written notification." 28 C.F.R. § 14.2(a) (1977). Thus we read these claims to incorporate the Notice of Claim.

However, we are unable to agree with appellants that incorporation of the Notice of Claim supplies "a claim for money damages in a sum certain" as required by 28 C.F.R. § 14.2(a). This requirement has been strictly enforced by the courts. *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974) (listing damages as unknown inadequate); *Bialowas v. United States*, 443 F.2d 1047 (3rd Cir. 1971) (estimated damages inadequate). Just recently this circuit has ruled that a class claim for damages is inadequate to state a sum certain for the damages suffered by the individual

[2] Christine Beachel, James Beachel, Glen Beachel, Lara Beachel, Donald Peterson, Barry Peterson, Terri Ingells, Sharon Hays, Becky Richmond.

[3] Barbara Carlson, Gloria Peninger.

[4] Linda Jenkins, Sherry Nichols, Robert Case, Angela Rapier, Christopher Rapier, Douglas Jackson, Thomas Jackson.

[5] Tina Allison, Michael Delbridge, Cheryl Delbridge, Judy Whatcott, Laurie Whatcott, Kathleen Wilson, Violet Wilson, Wanda Wilson, Brenda Wilson.

filing the claim. *Caidin v. United States*, 564 F.2d 284, 287 (9th Cir. 1977).

In the instant case the amount claimed by each family listed on the Notice of Claim was stated separately. Since none of the families in Group 1 was included on the Notice of Claim, there is no amount which explicitly can be incorporated from the Notice. The appellants argue, however, that since each of the families listed on the Notice of Claim claimed $1,000,000 in damages, it is clear from their reference to the Notice of Claim that they also intended to claim $1,000,000 in damages per family.

We are not convinced. Damages properly reflect an individualized determination of losses suffered. Families in differing economic circumstances would be expected to suffer differing damages for the wrongful death of the breadwinner. The mere fact that all the families listed on the Notice of Claim demanded $1,000,000 does not mean that all other families who later choose to file claims would also claim a similar amount. To constitute "a claim for money damages in a sum certain" either the document incorporating another or the incorporated document must set forth a sum certain claim of damages *explicitly* applicable to the claimant or group of claimants. Thus, had the $1,000,000 figure been set forth explicitly of the SF 95, or had the Notice of Claim provided that the $1,000,000 demand was applicable to all SF 95s that incorporated the Notice, the sum certain claim requisite would have been met. Neither circumstance existed in this case.

We recognize that government employees in the Department of the Interior docketed the claims of Group 1 families at a value of $1,000,000. This circuit has held, however, that "some undefined principle of estoppel" will not operate to prevent the government from asserting jurisdictional requirements. *Powers v. United States*, 390 F.2d 602, 604 (9th Cir. 1968). We also note that this circuit has consistently rejected the argument that mere notice to the government of an accident and injury is sufficient to satisfy the administrative claim requirement. *Avril v. United States*, 461 F.2d 1090 (9th Cir. 1972). Thus, the government's interpretation of imprecise documents in the manner intended by the appellants does not affect our task of determining whether the administrative claim requirement has been met. We hold, therefore, that the appellants in Group 1 failed to include a sum certain claim for damages in their administrative claims and so were properly dismissed.

Our disposition of the arguments presented by Group 1 also mandates the result for Group 2. Assuming *Arguendo* that the claims of these children were adequately presented by the claims filed by their mothers, there still would be a failure to state a sum certain because no one in the families represented by Group 2 was listed on the Notice of Claim and the only information contained on the mothers' SF 95 was a notation to "See Notice of Claim." Nowhere was a sum certain claim explicitly linked to the mothers of these children. Thus, the order of dismissal as to Group 2 must also be affirmed.

C. Requirement That Individual Claims Be Filed.

Group 3 consists of two adult children who were not listed as claimants on the SF 95 filed by their respective mothers, but were included on an attached list of "survivors." Both their mothers were listed on the Notice of Claim, so incorporation by reference can be used to provide a sum certain claim for damages for each of these families. The explicit link exists provided the SF 95s are adequate. In making this determination, we are not particularly concerned by the fact that they were listed as survivors rather than claimants on their mothers' SF 95. Rather the underlying issue presented here is whether adult claimants must file an individual claim or whether they can be effectively included in a claim filed by their mother.

We realize that state law determines who may present a claim based on death. 28 C.F.R. § 14.3(c). Idaho law provides that the right to bring a wrongful death action belongs to the heirs of the decedent. *Idaho Code* § 5-311. Heirs are defined to include the surviving spouse and issue. *Idaho Code* §§ 15-2-102 & 15-2-103. These Idaho statutes have been interpreted as providing a joint and indivisible cause of action for the heirs. *Campbell v. Pacific Fruit Express Company*, 148 F. Supp. 209, 211 (D. Idaho 1957).

We do not think, however, that *Campbell* authorizes a single heir to file an action on behalf of all others. On the contrary, the *Campbell* court dismissed the action because of the failure to join all the heirs.[6] The fact that each heir is an indispensable party in a

[6] The California courts have interpreted a similar wrongful death statute as requiring compulsory joinder, rather than creating a joint cause of action. *Cross v. Pacific Gas & Electric Co.*, 36 Cal. Rptr. 321, 388 P.2d 353 (1964). In that case the court approved a tolling of the Statute of Limitations for minor plaintiffs despite the fact that the adult heirs were barred by the running of the statute. Similarly, in this case, each heir should be required to individually satisfy the administrative claim requirement even though all must join together in a single suit.

wrongful death action does not dispose of the issue whether the parent has inherent authority to file an administrative claim on behalf of an adult child. However, it does suggest that the parent lacks full power to litigate such actions on behalf of adult children. In view of this limitation, but mindful of the absence of precise Idaho authority, we believe it is more consistent with Idaho law and the purposes of the requirement of an administrative claim to hold that the parent has no inherent authority to file an administrative claim on behalf of an adult child.

The claim requirement was designed to provide the government with accurate information as to the settlement value of the case.[7] The number of heirs who can claim damages for the death is obviously an important factor in determining the value of the claim. However, only those heirs who will participate in the suit need be considered in ascertaining damages. Requiring individual administrative claims will provide the government with more accurate information as to the number of heirs who are interested enough to pursue the action and so should be considered in figuring the settlement value.[8]

Family claims filed by the mother should be measured against the principles which invalidated the class administrative claim in *Caidin v. United States, supra* and *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11 (3rd Cir. 1975). In *Caidin* we held that a class administrati was not valid unless there was a contemporaneous assertion of authority for the class representative to act for each of the class members. Similarly, we think that before one family member can present a joint claim on behalf of all adult members of the family, there must be a showing that such person is authorized to represent such other members.

Because the record discloses no evidence indicating that the Group 3 appellants authorized their mothers to act for them, we

[7] The purpose behind requiring the filing of an administrative claim was to "expedite the fair settlement of tort claims asserted against the United States." 1966 U.S. Code Cong. & Ad. News 2516.

[8] *Van Fossen v. United States*, 430 F. Supp. 1017 (N.D. Calif. 1977) can be distinguished from the instant case because there the alleged defect in the administrative claim, the failure to present the claim in the name of a personal representative as required by Virginia law, did not interfere with settlement negotiations.

shall remand to the district court for a determination as to whether such authority existed at the time the claims were filed.

D. Authority of Attorney to File Notice of Claim.

The Group 4 appellants appear only on the Notice of Claim and insist that it alone is a valid administrative claim. We agree that any "written notification of an incident, accompanied by a claim for money damages in a sum certain" constitutes a valid administrative claim. 28 C.F.R. § 14.2(a). The Notice of Claim filed here provides such information. The problem Group 4 encounters is that the Notice of Claim is signed only by Ormes, the attorney. There is no indication in the record that Ormes had any authority to represent Group 4 appellants. In this respect Group 4-s problem is identical to that of Group 3.

As already indicated, the claim must "be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative." 28 C.F.R. § 14.3(e).

Somewhat surprisingly the government did not argue that the failure to show Ormes' authority invalidated the administrative claims of Group 4. Instead, the government agreed to accept reinstatement of this group. As noted above, however, the administrative claim requirement is jurisdictional and the government is powerless to waive it. A proper claim must be filed and denied before there is any federal court jurisdiction to hear these actions.[9]

[9] Our decisions in *Blain v. United States*, 552 F.2d 289 (9th Cir. 1977), and *Caidin v. United States*, 564 F.2d 284, 287 (9th Cir. 1977), logically lead us to this conclusion. It could be argued that *Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975), and *Mathews v. Eldridge*, 424 U.S. 319, 326-32 (1976), are inconsistent with this position. There, the Supreme Court waived strict compliance with the finality requirement for jurisdiction under 42 U.S.C. § 405(g). The Court in *Eldridge* stated that administratively imposed exhaustion of remedies requirements could be waived by the Secretary, while only the presentation of the claim requirement was jurisdictional. *Id.* at 328. There is a difference, however, between an agency's waiving the exhaustion requirement to perfect a claim and the filing of a claim itself. Both *Salfi* and *Eldridge* adhere to this distinction. The first may be waived in certain cricumstances, but the latter is statutorily required and may not be waived by the government.

Here, the statute requires the filing of a "claim." 28 U.S.C. § 2675(a). What is required to qualify as a claim is established by regulation. 28 C.F.R. § 14.2. The purported claims did not qualify as "claims" and, therefore, there is no jurisdiction. Thus, *Salfi* and *Eldridge* provide no reason for us to discontinue or insistence stated in *Blain* and *Caidin* that these claim requirements be satisfied.

Therefore, in a manner similar to our disposition of Group 3, we must remand to the district court for a determination of whether Ormes was indeed authorized to represent Group 4 appellants at the time the Notice of Claim was filed. Unless the district court is presented with evidence documenting this authority, the order dismissing these appellants must also be affirmed. Our remand with respect to Groups 3 and 4 is not a strict application of 28 C.F.R. § 14.3(e), for such would require us to dismiss their claims. We have softened its vigor because these two groups present problems not previously considered by this court and because, with respect to Group 4, the government's reinstatement of their claims indicates that any failure to comply was not prejudicial to the government. This departure from the literal language of the regulation does not indicate a willingness to treat the failure of the agent executing the administrative claim (1) to show his "title or legal capacity" and (2) to accompany the claim with "evidence of his authority" to present such claim as merely technical defects. Such a failure, in the absence of unusual and extenuating circumstances such as exist in this case, deprives the court of jurisdiction to hear the suit. We expressly disapprove of *Hunter v. United States* 417 F. Supp. 272 (N.D. Cal. 1976) to the extent that it can be interpreted as holding to the contrary.

E. Authority of Parents to File For Minor Children.

The final group of appellants, Group 5, consists of children who were listed as claimants on a SF 95 prepared by their mothers, but who were not individually listed on the Notice of Claim as having a $1,000,000 claim. Thus, there exists the explicit link which is required and the incorporation by reference of the Notice of Claim was effective to state a sum certain claim for the family group. However, the SF 95s were signed by the surviving spouse in each case and the children did not individually and separately present their claims.

If any of the children in this group are adults, their situation would be indistinguishable from that of Group 3. It appears, however, that at least some of the children in this group are minors. We hold that since the parent has inherent authority to represent the interest of a minor child, a joint claim filed by a mother on behalf of her children is appropriate. The parent of a minor child is a "person legally entitled to assert a claim for [wrongful death] in accordance with applicable state law. 28 C.F.R. § 14.3(c). *Idaho Code* § 15-1-403(b)(2) provides that a parent may represent and bind his minor child in judicial

proceedings. Since the parent is the automatic legal representative of the child once the issue progresses to the litigation stage, it would be inappropriate to require a recitation of the minority of the children and the applicable state law at the administrative claim stage. The government's ability to settle the case is not hampered by not requiring these recitations inasmuch as the parents can accept a settlement for the child. We remand to the district court for a determination as to which of these appellants are minors and so entitled to reversal of the order of dismissal entered against them. With respect to those not minors the district court must determine, as it must with respect to Group 3, whether at the time the claims were filed their respective mothers had authority to file for them.

II.

Third Party Actions.

As already mentioned, consolidated with the appeal from the dismissal of the 60 plaintiffs is an appeal order of summary judgment in favor of the third party defendants, the eight small mining companies. This appeal requires us to determine whether the third party defendants are employers under the terms of the Idaho Workmen's Compensation Act and so entitled to immunity from tort liability and whether they are proper third party defendants in the action brought by Sunshine Mining Company.

A. Facts.

It will be recalled that, in addition to their claims against the United States under the FTCA, the plaintiffs named other defendants in this action, including PVO International, Inc. and Polytron Company, manufacturers of a polyurethane foam which had been installed in the mine and allegedly contributed to the quick spread of the fire. Additionally, Sunshine Mining Company and its insurance carrier filed actions against these defendants, seeking to recover for the property damage and loss of profits suffered by the mine as the result of the fire. PVO and Polytron then filed third party complaints in all these actions seeking contribution and indemnity from eight small companies which own mining claims in the Sunshine Mine complex. These claims were being worked by the Sunshine Mining Company. The third party complaints allege that these small companies had a duty to see that their claims were being operated safely and that the failure to fulfill this duty was the proximate cause of plaintiff's damages.

The third party defendants moved for summary judgment on all counts. As to the wrongful death claims, the third party defendants argued that they are employers and thus immune from tort liability under the exclusivity provisions of the Idaho Workmen's Compensation Act. In the property damage action brought by Sunshine Mining Company, the third party defendants argued that their interests are so closely allied with those of Sunshine that they should be treated as plaintiffs and not third party defendants. The district court granted summary judgment on all counts. We reverse as to the wrongful death claims and affirm as to the property damage action.

B. Idaho Workmen's Compensation Act.

Appellants, PVO and Polytron, insist that the eight small mining companies are not employers and so are not elible for any immunity granted by the Idaho Workmen's Compensation Act. We agree.[10]

1. Direct Employer.

The Idaho Code defines an employer as "any person who as expressly or impliedly hired or contracted the services of another." *Idaho Code* § 72-102(10). This statutory language forcuses on the party making the hiring decision. Prior to 1971 when the above definition was added to the Code, the Idaho cases, decided under the common law, established that the right to control and direct the activities of the workers is the key factor in finding an employer-employee relationship. *Merrill v. Duffy Reed Construction Co.*, 82 Idaho 410, 353 P.2d 657 (1960). Thus, it is necessary to examine the operating agreements entered into by the third party defendants and Sunshine Mining Company to determine who had the right to hire workers and who exercised control over the activities of the miners.

Our job of interpreting these agreements is made more difficult by the fact that there are seven different agreements involved here. However, they share certain features. Sunshine Mining Company is given the exclusive right to conduct development and mining operations on all the claims owned by the small

[10] Our disposition of this issue makes it unnecessary for us to determine whether Idaho law extends the immunity provided by the Workmen's Compensation Act to a suit for contribution and/or indemnity brought by a third party. *See* Larson, Workmen's Compensation Law, §§ 76.21 and 76.42 (1976).

companies covered by these agreements. Most of the agreements give Sunshine the right to suspend operations and require that, even if the other party wishes to independently finance continued operations, Sunshine must be engaged to do the actual work. The agreements generally give the non-operating party a right to inspect the operation, but actual control over operations is vested in Sunshine. It is thus apparent that Sunshine Mining Company alone has the right to control the day to day activities of the miners. These agreements do not specify expressly who has the right to hire workers, but a strong and permissible inference is that the owners of the non-operating interests could not do so.

The unit agreement entered into by Sunshine, Hecla and Silver Dollar, which covers the area in which the fire took place, is even more explicit in investing Sunshine Mining Company with exclusive *control* over the workers. Article VII of that agreement provides that "the number of employees of the unit operator and their selection and the terms of labor and compensation for services performed, shall be determined by the unit operator, and the said employees shall be the employees of the unit operator." To assert that this does not give Sunshine the exclusive power to hire requires a taste for literalism beyond reason. We hold that under both tests for establishing a direct employer, Sunshine Mining Company must be considered the sole direct employer.

Third party defendants present two arguments in an attempt to avoid this conclusion. They rely on the Idaho mining partnership law, *Idaho Code* § 53-401 et seq., and the Idaho cases concerning joint ventures. Since the workmen's compensation act specifically allows partnerships or associations to be employers, *Idaho Code* § 72-102 (19), they argue that the joint entity created by the operating agreement is the direct employer. Should the entity not be recognized under Idaho law it follows, they argue, that each member of the entity must be considered the employer.

We agree that some form of joint venture existed here. We also recognize that control need not be shared equally between members of a joint venture, but can be delegated to one member of the group. *Shell Oil Company v. Prestidge*, 249 F.2d 413 (9th Cir. 1957). Thus, the limited control retained by third party defendants here does not preclude classification of these arrangements as joint ventures. We remain convinced, however, that under the terms of the unit agreements Sunshine alone was the direct employer.

Our holding requires that we examine *Clawson v. General Insurance Company of America*, 90 Idaho 424, 412 P.2d 597, 601 (1966). In *Clawson* the Idaho Supreme Court held that "a joint venture is not an entity separate and apart from the parties composing it." Thus, there is no separate entity which can be considered the employer. Moving from this unassailable position, third party defendants insist that *Clawson* requires that members of a joint venture always be considered joint employers of those working for the venture. While *Clawson* treated members of the joint venture as joint employers it did so with respect to its particular facts. In *Clawson* two contractors formed a joint venture to construct a school. The joint venture, as such, had no insurance coverage, but each individual member of the joint venture was covered by a surety bond. The Idaho court held that an injured worker could claim against both of the sureties covering the individual members of the joint venture.

The *Clawson* court, in so holding, emphasized that the member's activities in the joint venture project were of the same type which they pursued in their private businesses in which both were then also actively engaged. Moreover, it does not appear that one member was subservient to the other with respect to the affairs of the joint venture. Under such circumstances the court, having refused to treat the joint venture as the employer, had no choice but to treat each member thereof as the employer. Being indistinguishable, parity of treatment was required.

Parity, however, may be improper when the members are distinguishable. Indeed, to establish the employer for the purposes at hand, once the joint venture is discarded, requires that each member be measured against Idaho's employer-determining tests. To discard the entity, on the one hand, and to then treat the members of the venture as fungible, on the other, is to do ultimately what initially one refused to do. Once the entity is swept away the members should be treated as individuals for the purposes at hand. To do otherwise is to reintroduce the entity.

Approached in this manner our conclusion becomes inevitable. Third party defendants did not work the mines. Sunshine did. Third party defendants did not control the employees. Sunshine did. Third party defendants did not have rights with respect to each and every joint venture. Sunshine did. Third party defendants did not hire the employees. Sunshine did. To clothe third party defendants with Sunshine's apparel merely

because a joint venture existed would be inconsistent with *Clawson*'s rejection of entityship for joint ventures.

We recognize that third party defendants contributed to the costs of the workmen's compensation insurance coverage, under the cost-sharing provisions of the operating agreements. This is not the decisive factor in fixing the identity of the direct employer eligible for immunity under the statute. In order to avoid distorting the direct employer concept beyond recognition, the element of control over the employee must be present. This position is supported by recognition in the Idaho statute of an additional group, Statutory Employers, which receives employer treatment although they are not direct employers. *See* §2 *infra*. This strongly suggests a legislative intent to restrict employer treatment to hose who meet the ordinary employer-determining tests or come within the special statutory definition. Only Sunshine meets the ordinary tests; hence, we hold that it alone is the direct employer of the miners killed in the fire.

2. Statutory Employer.

The Idaho statute provides that employer also

> "includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who . . . for any other reason, is not the direct employer of the workmen there employed." *Idaho Code* §72-102(10).

Since the third party defendants do own some of the property being mined, it is argued they fit within the category of stratutory employer.

The cases have established that right to control is *not* a factor in determining who is a statutory employer. *Miller v. FMC Corp.*, 93 Idaho 695, 471 P.2d 550 (1970). Indeed, the purpose of including the special statutory definition was to broaden the concept of employer beyond what was recognized at common law. *Adams v. Titan Equipment Supply Corp.* 93 Idaho 644, 470 P.2d 409 (1970).

However, in a series of cases interpreting Idaho law, this circuit has established that the statutory employer classification is only available to those owners who are also an operator of the business being carried out by the workers. *Kirk v. United States*, 232 F.2d 763 (9th Cir. 1956); *Roy v. Monsanto Company*, 420

F.2d 915 (9th Cir. 1970). Thus, in the *Monsanto* case a manufacturing company was held not to be the employer of workmen hired by a construction company engaged in new construction at the manufacturing plant. The court found that Monsanto was not in the construction business and so could not be the employer of the construction workers.

Here, the small companies are not actively involved in the operation of the mine. They are not "the operators of the business there carried on." They do share in the profits of the mining business being carried on, but theirs is a non-operating interest. Their position, while not identical, is similar in relevant respects to that of one who contracts to have work done for him. The Idaho cases, relied on in the *Monsanto* case, clearly establish that such a person is not an employer under the statutory definition, even though he benefits from the work done. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943) (physician who contracted to have a house built is not the employer of workmen involved in the construction); *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948) (city which contracted for construction of sewer is not employer of workmen hired by subcontractor). Thus, we hold that the third party defendants are not statutory employers.[11] Since they are neither direct nor statutory employers of the miners, the statutory immunity is not available and the grant of summary judgment must be reversed.

C. Third Party Complaint in Sunshine Mining Company Action.

Third party defendants were also named by PVO and Polytron as third party defendants in the action brought by Sunshine Mining Company against them for damages to the mine. The district court also granted summary judgment in favor of the third party defendants in this action. We agree that a third party complaint seeking contribution and indemnity must fail when the third party defendant stands in the same position as the original plaintiff. In this situation the third party defendant's liability is not the secondary or derivative liability required for impleader. *See* Wright and Miller, Federal Practice and Procedure § 1446. Instead a motion under Rule 19 to add the alleged third party defendant as a necessary plaintiff would result in the proper alignment of parties. On the record before us, third party defendants, by virtue of the operating agreements, share with

[11] This holding makes it unnecessary to decide the extent of the exception to employer tort immunity provided by *Idaho Code* § 72-223.

Sunshine Mining Company the interest in the mine. Thus, the third party complaint against them was improper and the grant of summary judgment on this action is affirmed.

Affirmed in part, Reversed in part, Remanded in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO[1]

HELEN HOUSE, et al., *Plaintiffs,* vs. MINE SAFETY APPLIANCE COMPANY, et al., *Defendants,* and POLYTRON COMPANY, now known as POLYCO LIQUIDATING CORPORATION, a California corporation, *Third Party Plaintiff,* vs. SILVER DOLLAR MINING COMPANY, an Idaho corporation; POLARIS MINING COMPANY, a Delaware corporation; HECLA MINING COMPANY, a Washington corporation; BIG CREEK APEX MINING COMPANY, an Idaho corporation; SILVER SURPRIZE, INC., an Idaho corporation; SUNSHINE CONSOLIDATED, INC., an Idaho corporation; SILVER SYNDICATE, INC., an Idaho corporation; BISMARK MINING COMPANY, an Idaho corporation; METROPOLITAN MINES CORPORATION LIMITED, an Idaho corporation; UNITED STEELWORKERS OF AMERICA; LOCAL UNION NO. 5089 OF THE UNITED STEELWORKERS OF AMERICA, *Third Party Defendants.*	) Civil No. 1-73-50) ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment of Third Party Defendant, SUNSHINE MINING COMPANY, having come

[1] The Sunshine Mine case included the above case and two other cases against the same defendants: *Ajrvell E. Fowler v. Mine Safety Appliances Company, et al.*, Civil No. 1-74-70 and *Sandra Norris, et al. v. Mine Safety Appliance Company*, Civil No. 1-74-71. The cases were consolidated for trial, and the judgments and orders are identical in each case.

on regularly for hearing, pursuant to notice, on the 23rd day of April, 1976, before the above entitled Court, and it appearing to the Court that the files reflect that due and regular service of said motion having been given by said Third Party Defendant to all the Plaintiffs, Third Party Plaintiffs and all Defendants in these consolidated actions, and

It appearing to the Court that said Third Party Defendant above named was represented by E. L. Miller of the lawfirm of Miller & Knudson, Coeur d'Alene, Idaho, and the Third Party Plaintiff, POLYTRON COMPANY, was represented by Michael Brady of the lawfirm of Moffatt, Thomas, Barrett & Blanton of Boise, Idaho, and

It further appearing to the Court that there is no genuine issue of any material fact pertaining to the Third Party Plaintiff's several claims against this Third Party Defendant, and the matter having been fully briefed by each and all of said parties, which briefs were duly submitted to the Court and the Court having heard oral arguments on the contentions of each of said parties,

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED, that the Third Party Complaint fails to state a claim for which relief may be granted and that the Third Party defendant above named is, under the satatutes of the State of Idaho, immune from any claim of indemnity and/or contribution on the theory of tort as sought by the Third Party Compalint, and

IT IS HEREBY FURTHER ORDERED, AND THIS DOES ORDER, ADJUDGE AND DECREE, that the Motion for Summary Judgment of this Third Party Defendant shall be and the same is hereby granted as a matter of law as to all claims made by Third Party Plaintiff against this Third Party Defendant.

That pursuant to Rule 54, Federal Rules of Civil Procedure, there is no just reason for delay in the final decision and the Court expressly directs that a judgment be entered in favor of this Third Party Defendant and against the above entitled Third Party Plaintiff, and

Further that costs shall not be awarded by or against any of the parties hereto.

DATED this 10th day of May, 1976.

Ray McNichols

JUDGMENT

Pursuant to the order granting summary judgment in favor of the Third Party Defendants, SILVER DOLLAR MINING COMPANY, POLARIS MINING COMPANY, HECLA MINING COMPANY, BIG CREEK APEX MINING COMPANY, SILVER SURPRIZE, INC., SUNSHINE CONSOLIDATED, INC., SILVER SYNICATE, INC., BISMARK MINING COMPANY and METROPOLITAN MINES CORPORATION, LIMITED, and against the Third Party Plaintiff, POLYTRON COMPANY, in the above entitled cause dated the 6th day of May, 1976,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE That the Thrid Party Plaintiff have and recover nothing from these Third Party Defendants, and that said Third Party Defendants be and hereby are forever dismissed from the above entitled cause, with judgment granted to these Third Party Defendants, and the Third Party Plaintiff in the above entitled cause shall have and recove nothing from these Third Party Defendants; and it is further adjudged that as and between the Third Party Plaintiff and these Third Party Defendants, each shall bear their own costs.

DATED This 6th day of May, 1976.

Ray McNichols, Judge

APPENDIX C

The Idaho Mining Partnership Law, *Idaho Code* § 53-402, 53-403, 53-405 and 53-410 state as follows:

> "53-402. Express agreement not necessary. — An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interest in the mine and working the same for the purpose of extracting the minerals therefrom."

> "53-403. Sharing profits and losses. — A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine, bears to the whole partnership capital or whole number of shares."

> "53-405. Mine partnership property. — The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property."

> "53-410. Majority of shares governs. — The decision of the members, owning a majority of the shares or interests in a mining partnership, binds it in the conduct of its business."

APPENDIX D

The Idaho Workmen's Compensation Law, *Idaho Code* §§ 72-102(10) and 72-209 state in pertinent part:

> "72-102(10). 'Employer' means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed. If the employer is secured, it means his surety so far as applicable."

> "72-209. Exclusiveness of liability of employer. — (1) Subject to the provisions of section 72-223, the liability of the employer under this law shall be exclusive and in place of all other liability of the employer to the employee, his spouse, dependents, heirs, legal representatives or assigns.
>
> (2) The liability of an employer to another person who may be liable for or who has paid damages on account of an injury or occupational disease or death arising out of and in the course of employment of an employee of the employer and caused by the breach of any duty or obligation owed by the employer to such other person, shall be limited to the amount of compensation for which the employer is liable under this law on account of such injury, disease, or death, unless such other person and the employer agree to share liability in a different manner.
>
> (3) The exemption from liability given an employer by this section shall also extend to the employer's surety and to all officers, agents, servants and employees of the employer or surety, provided that such exemptions from liability shall not apply in any case where the injury or death is proximately caused by the wilful or unprovoked physical aggression of the employer, its officers, agents, servants or employees, the loss of such exemption applying only to the aggressor and shall not be imputable to the employer unless provoked or authorized by the employer, or the employer was a party thereto."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-71

SILVER DOLLAR MINING CO., et al.,

Petitioners,

v.

PVO INTERNATIONAL, INC.,
a California corporation and POLYTRON COMPANY,
now known as POLYCO LIQUIDATING CORPORATION,
a California corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 2, 1978

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STATUTES INVOLVED

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents, PVO International, Inc., a California corporation and Polytron Company, nka Polyco Liquidating Corporation, a California corporation, respectfully urge this Court to deny the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether Petitioners-Third Party Defendants were employers within the meaning of the Idaho Workmen's Compensation Act of the miners who died in the Sunshine Mine fire and thus immune from suit for contribution or indemnification.
2. Whether the holding of the United States Court of Appeals for the Ninth Circuit that Petitioners-Third Party Defendants were not the employers of the miners and thus not immune from liability is in conformity with applicable Idaho law.

STATUTES INVOLVED

Idaho Code §§ 72-102(10) and 72-209, which are set out in Appendix D to the Petition for a Writ of Certiorari, and *Idaho Code* § 72-210, which is set out in Appendix B to this Response.

STATEMENT OF CASE

On May 2, 1972, a fire broke out in the Sunshine Silver Mine near Kellogg, Idaho. As a result of the fire, 91 miners employed by the Sunshine Mining Company were killed.

Less than two years later civil actions for wrongful death (hereinafter "wrongful death cases") were brought in the United States District Court for the District of Idaho by the heirs of approximately two-thirds of those miners killed in the fire against numerous defendants, including Respondents-Third Party Plaintiffs. The heirs' basic allegation was that polyurethane foam manufactured by Respondent-Third Party Plaintiff Polytron Company was sold to the Sunshine Mining Company and placed in the mine, and the polyurethane foam contributed to the severity of the fire at the mine, proximately causing the deaths of the heirs' decedents.

Less than three years after the fire the Sunshine Mining Company and representatives of its property damage insurance carriers also brought a separate action (hereinafter "property damage cases") against the same defendants, including Respondents, and mirrored the allegations of the heirs, seeking recovery of property damage and loss due to business interruption allegedly caused by the fire. All actions were consolidated in the United States District Court for the District of Idaho for purposes of discovery and trial.

Respondents filed third party complaints in the wrongful death and property damage cases against Petitioners seeking contribution or indemnification. Petitioners each maintained an interest in the complex known as the Sunshine Mine by virtue of separate agreements between each of the Petitioners and Sunshine Mining Company, and the third party actions were based upon allegations of negligence for which Petitioners were responsible which proximately caused or contributed to the deaths.

Petitioners moved in the District Court for summary judgment of dismissal of all of respondent-third party claims in the wrongful death cases and the property damage cases. Petitioners argued, as respects the third party claims in the wrongful death cases, that they were employers within the meaning of The Idaho Workmen's Compensation Act of the miners killed in the Sunshine fire and thus statutorily immune from suit by Respondents. As respects the third party claims in the property damage cases, Petitioners argued that their interests were sufficiently allied to those of the Sunshine Mining Company, that Petitioners should be treated as plaintiffs in the action with Sunshine Mining Company and that a third party action against them was improper.

The District Court granted Petitioners motions for summary judgment against the Respondents' third party claims in both the

wrongful death and property damage cases. No memorandum opinion was entered by the District Court, but the Order Granting Summary Judgment is set forth in Appendix B to the Petition for Writ of Certiorari.

Respondents took an appeal to the United States Court of Appeals for the Ninth Circuit from the judgment dismissing the third party complaints. Following review and full consideration of the record, the briefs submitted and the oral arguments presented, the Court of Appeals filed its opinion reversing the District Court's Judgment of Dismissal of Respondents'-Third party complaints in the wrongful death cases, affirming the Judgment of Dismissal of the third party complaints in the property damage cases and remanding the case to the District Court for further proceedings. The opinion of the Ninth Circuit is set forth in Appendix A to the Petition for Writ of Certiorari.

In reversing the District Court's dismissal of the Respondents' third party claims against Petitioners in the wrongful death cases, the Ninth Circuit held the Petitioners were not employers as that term has been defined by Idaho statutes and case law. The Ninth Circuit reviewed the record, including the various agreements between Petitioners and the Sunshine Mining Company for operation of the Sunshine Mine. Following applicable Idaho statutory definitions and case law, the Ninth Circuit determined that Petitioners were not the direct employers of the deceased miners as Petitioners had no right to control or direct the activities of the miners working at the Sunshine Mine. The Ninth Circuit then examined the record as to whether Petitioners were statutory employers as defined by Idaho statute since the right to control is not a factor in determing whether immunity from suit is granted to statutory employers. The Ninth Circuit concluded Petitioners also were not statutory employers since, although having some ownership interest in mining claims forming a part of the Sunshine Mine, Petitioners were not the proprietors or the operators of the Sunshine Mine. Thus, Petitioners could not claim the benefit of statutory immunity granted to employers and it followed that summary judgment granted to Petitioners in the wrongful death cases was improper.

REASONS FOR DENYING WRIT

No better reason exists for denial of the Petition than that the Ninth Circuit based its decision upon Idaho statutory and case law and conformed to the Idaho Supreme Court's interpretation of that law in reaching its conclusion. It must be emphasized that there is no decision of the Idaho Supreme Court directly in point. Thus, resort must be made to the Idaho statutory laws and the Idaho cases which have so far interpreted Idaho's Workmen's Compensation Act.

Idaho Code, Section 72-102(10) defines an employer as follows:

> "'Employer' means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and sub-contractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed. If the employer is secured, it means his surety so far as applicable." (Appendix D, Petition for Writ of Certiorari)

Thus the above definition creates what has been labeled as two classes of employers who are entitled to immunity; direct employers in the common law sense and statutory employers as defined by statute.

In determining whether a person is a direct employer Idaho's Supreme Court has consistently held that the single-most important test is the right to control and direct the activity of the workers. *Merrill v. Duffy Reed Construction Co.*, 82 Idaho 410, 353 P.2d 657 (1960). The Ninth Circuit recognized this rule and examined the agreements to determine whether Petitioners maintained the requisite control of the miners to be considered direct employers of them. The Ninth Circuit concluded Petitioners had no such control as evidenced by the agreements between Sunshine Mining Company and Petitioners and therefore Petitioners could not be considered direct employers.

Respondents have set forth as Appendix A the unit agreement between Sunshine Mining Company, Hecla Mining Company and Silver Dollar Mining Company. The unit agreement is the most comprehensive of the agreements between Sunshine Mining Company and the petitioners. Article II, Paragraph 2.1, of the unit agreement provides that the "unit operator" is Sunshine Mining Company. Article IV, Paragraph 4.1, provides that the unit operator is to "supervise, manage and conduct" the mining operation. Paragraph 4.2 states that if the non-operators do not agree with Sunshine Mining Company regarding exploration and development, the non-operator can proceed but must employ Sunshine Mining Company to do the work. Article VI, Paragraph 6.1, states that Sunshine Mining Company's decisions as to work will be final. Article VII, Paragraph 7.1, states that all employees shall be the employees of Sunshine Mining Company, not of Petitioners. (Appendix A)

The other agreements between the remaining Petitioners and Sunshine Mining Company also contain the common features of granting Sunshine Mining Company the exclusive right of

operation of all claims and vest exclusive control of the operation in Sunshine Mining Company, not jointly with Petitioners. Thus, the record revealed that Petitioners had no control or right to control of the miners and therefore could not be direct employers of them.

The Ninth Circuit also reviewed the case of *Clawson v. General Insurance Company of America*, 90 Idaho 424, 412 P.2d 597, 601 (1966), but found it distinguishable from the facts at hand. Even though a joint venture may have existed between Petitioners and Sunshine Mining Company, the element of control must be present for Petitioners to be employers. In *Clawson*, the Idaho Supreme Court disregarded the joint venture entity and held both members liable for workmen's compensation benefits because both members exercised equal control of the operation and of the employees of the venture. Petitioners here had no control or right of control of the employees of Sunshine Mining Company. Thus *Clawson* is inapplicable and the Ninth Circuit correctly so ruled. Petitioners ignore the requirement that the Idaho Supreme Court has established; that control or the right to control workers in their daily activities is essential to an employer-employee relationship under the workmen's compensation act.

Petitioners also continue to make reference to their payment of a portion of the premiums for workmen's compensation insurance coverage for the deceased miners and payment of a portion of the workmen's compensation award to the survivors of the deceased miners as entitling them to immunity. However, Idaho law does not grant statutory immunity to someone simply because workmen's compensation insurance coverage is purchased or a workmen's compensation award is paid. Nowhere does The Idaho's Workmen's Compensation Act provide that simply by indirectly paying for insurance coverage or indirectly paying an award are Petitioners ipso facto immune from common law liability outside the workmen's compensation act. The actual relationship between Petitioners and the deceased miners is what is determinative of whether Petitioners are employers. Furthermore, the payment of insurance premiums and portions of awards was assumed by Petitioners by virtue of their agreements with Sunshine Mining Company. Sunshine Mining Company passed a portion of such expenses on to Petitioners. But only Sunshine Mining Company was required by Idaho law to purchase workmen's compensation insurance, as Sunshine Mining Company was the employer of the workers in the mine. See I.C. § 72-210 (Appendix B). Petitioners cannot make themselves employers under Idaho law simply by agreeing to pay a part of the expense which by law belongs only to Sunshine Mining Company.

The Ninth Circuit correctly held that Petitioners were not

statutory employers. The agreements clearly reflect that Petitioners were not the operators of the mine or virtually the proprietors of the business. See *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943) and *Roy v. Monsanto Company*, 420 F.2d 915 (9th Cir. 1970). The Ninth Circuit correctly applied Idaho law in reaching their conclusion.

Petitioners argue that the Ninth Circuit's ruling in the property damage case makes the ruling in the wrongful death cases inconsistent. But Petitioners, by their various agreements with Sunshine Mining Company, agreed to share in costs of repair of the mine and to share in certain expenditures for rehabilitation. Thus, Petitioners, by virtue of their agreements with Sunshine Mining Company, had a right to share in any recovery by Sunshine Mining Company from the property damage cases. However, in the wrongful death cases the question of Petitioners' immunity is determined not by virtue of their contracts with Sunshine Mining Company but by operation of law and the extent of control which Petitioners retained or exercised over those working in the mine. The tests to be applied in determining whether Petitioners are immune from suit as employers of the miners are entirely different than those applied to determine if Petitioners are proper third party defendants in the property damage cases. The fact that a dismissal of the third party actions in the property damage cases was affirmed cannot be compared to a reversal of the dismissal in the wrongful death cases when analyzing the correctness of the Ninth Circuit's ruling. The correct application of Idaho law required the conclusion reached by the Ninth Circuit.

CONCLUSION

Summary reversal would clearly be improper in this case. The Ninth Circuit followed Idaho law and reached a conclusion consistent with Idaho law. The Ninth Circuit's ruling was clearly proper for the reasons stated. Respondents urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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August 2, 1978

APPENDIX A

AGREEMENT

THIS AGREEMENT, Entered into this 25th day of September, 1958, between SILVER DOLLAR MINING COMPANY, an Idaho corporation, hereinafter called SILVER DOLLAR, POLARIS MINING COMPANY, a Delaware corporation qualified to transact business in the State of Idaho, hereinafter called POLARIS, and SUNSHINE MINING COMPANY, a Washington corporation qualified to transact business in the State of Idaho, hereinafter called SUNSHINE:

WHEREAS, on the 26th day of Marsh, 1948, Polaris and Sunshine entered into an agreement in writing, amended December 11, 1957, in and by which they established and/or redefined the boundaries of the Lower Intervening Area and Lower Intervening Area East Extension and described a territory north of the Chester vein embracing the extralateral rights of the Morning Star and Hecla No. 2 claims, established the ownership of any veins, ores or minerals found to exist within said areas as 50% Sunshine and 50% Polaris, and provided for Sunshine to operate within said areas for the equal account of Sunshine and Polaris, copy of which agreement and amendment are attached hereto marked "Exhibit 1"; and,

WHEREAS, on the 4th day of August, 1943, Polaris and Sunshine entered into an agreement in writing, in and by which they compromised and settled all controversies or disputes between themselves as to their respective rights in or ownerships of any and all ore which had theretofore been or which should thereafter be found in the Chester Vein in the Omega Area, as said "Chester Vein" and said "Omega Area" were defined in said written agreement, which said agreement is attached thereto marked "Exhibit 2"; and,

WHEREAS, thereafter, to-wit: on the 3rd day of March, 1944, an agreement in writing was entered into between Sunshine, Polaris, Silver Dollar and Lincoln Mining Company, in and by which said agreement it was agreed that any and all ore which should thereafter be found in said Chester Vein in that portion of said Omega Area which was designated and defined in said agreement as the "Rotbart Area" shall belong to and be owned by Polaris, Sunshine and Lincoln Mining Company in equal shares, that is to say, that Polaris, Sunshine and Lincoln Mining Company shall each own one-third (1/3) of any and all ore which shall hereafter be found in said Chester Vein in said Rotbart Area, with Silver Dollar being lessee of Lincoln Mining Company's interest, copy of which agreement is attached hereto marked "Exhibit 3"; and,

WHEREAS, an agreement in writing was entered into on the 4th day of March, 1944, between Polaris and Sunshine,

hereinafter referred to as "Polaris Operating Agreement", in and by which said agreement it was agreed that Sunshine in the orderly course of its operations, shall mine and extract Polaris' ore in the Chester Vein in the aforesaid Omega Area, and Polaris' ore in the aforesaid Rotbart Area, and shall mill or otherwise process said ore at Sunshine's plant or plants on Big Creek, Shoshone County, Idaho, under certain terms and conditions, copy of which agreement is attached hereto marked "Exhibit 4"; and,

WHEREAS, an agreement in writing was entered into on the 3rd day of March, 1944, hereinafter referred to as "Silver Dollar Operating Agreement", between Silver Dollar and Sunshine, in and by which said agreement it was agreed that Sunshine, in the orderly course of its operations, shall mine and extract certain ore owned by Lincoln Mining Company but under lease to Silver Dollar in the Chester Vein in the Rotbart Area (as said "Chester Vein" and said "Rotbart Area" are defined in that certain agreement dated March 3, 1944, referred to above ("Exhibit 3"— between Sunshine, Polaris, Silver Dollar and Lincoln Mining Company, an Idaho corporation, reference to which said agreement and the definition and description of which "Chester Vein" and of said "Rotbart Area" are hereby made), and shall mill or otherwise process said ore at Sunshine's plant or plants on Big Creek, Shoshone County, Idaho, under certain terms and conditions, including Sunshine's direct covenant and obligation to collect and pay a royalty of 12½% to Lincoln Mining Company on net smelter returns from sale of production from Lincoln Mining Company ore in Rotbart Area, copy of which agreement is attached hereto marked "Exhibit 5"; and,

WHEREAS, Sunshine, Polaris, Lincoln Mining Company and Hayden Hill Consolidated Mining Company as owners and Silver Dollar as lessee of Hayden Hill Consolidated Mining Company and Lincoln Mining Company interests entered into an agreement dated December 9, 1957, which adjusts and settles the rights of ownership of any and all ore which may be found in the Polaris Area and in the American Area in a vein or veins within the vertical boundaries of the New Purim Area as said Areas are described, by reference, in said agreement, copy of which said agreement is attached hereto marked "Exhibit 6"; and whereas Polaris recognizes and acknowledges its obligation to collect and pay a royalty due Lincoln Mining Company and Hayden Hill Consolidated Mining Company, lessors, on ores produced from the Polaris and American areas as such areas and such royalties are described in said agreement of December 9, 1957, which said obligation was undertaken by Polaris as the operator of the New Purim area in an agreement dated May 7, 1952, before said American and Polaris areas were established as sub-areas of said New Purim area in said agreement of December

9, 1957; and Polaris hereby transfers and assigns to Sunshine, who hereby accepts the same, the operating rights with the obligation to collect and pay royalties in the American and Polaris areas under the terms of the operating agreement of May 7, 1952; and,

WHEREAS, Sunshine is the owner of not only the ore, as such ownership is set forth above, but is also the owner of all ore in the Sunshine Area, as said Sunshine Area is described in "Exhibit 7" attached hereto; and,

WHEREAS, it was heretofore arranged between the parties hereto that an independent geologist, E. N. Pennebaker, should be employed to make a thorough geological examination of each and all of the various areas hereinabove mentioned and to evaluate the ore proven and the probable and the possible ore reserves in each and all of said areas and to submit his recommendations for such further exploration and/or development work in one or more or all of said areas so that a plan could be worked out under which all of said areas might be operated as a single unit; and,

WHEREAS it is the desire of the parties hereto to adopt a plan of unitization and to unitize the described unit area, having for its purpose the unitized management, operation and further development of the several areas in the unit area, all to the end that a greater recovery of ore may be had and waste and duplication prevented;

NOW, THEREFORE, In consideration of the premises and in furtherance of the aforesaid desire of each and all of the parties hereto and in compliance with the aforesaid report and recommendations of the said E. N. Pennebaker, as approved and/or subsequently modified by each and all of the parties hereto, and in consideration of the mutual covenants hereinafter set out and the mutual benefits and advantages to be gained by each and all of the parties hereto, the parties to this agreement hereby severally agree among themselves as follows:

ARTICLE I

UNITIZATION — CONVEYANCES

1.1 Each and all of the aforesaid areas described in Exhibits 1, 2, 3, 4, 5, 6 and 7, shall be consolidated into one single unit or Unit Area as described in "Exhibit 8" which is attached hereto, which said Unit Area shall be operated as a single unit as hereinafter provided, and that in order to effect such unitization each and all of the parties hereto shall upon the execution of this agreement make, execute and deliver to HAROLD W. COFFIN and VIRGINIA COFFIN, his wife, as trustee, quitclaim deeds and transfers and assignments of all leasehold interests, conveying and transferring to said trustee all of the right, title and

interest of each and all of the parties hereto in and to any and all ores and minerals in place and leasehold interests covering each and all of the areas in this paragraph above mentioned, such conveyance or conveyances and transfers and assignments to be so made to said trustee upon the express condition that immediately upon the trustee's receipt of such conveyance or conveyances said trustee will make, execute and deliver to the parties hereto quitclaim deeds and transfers and assignments of said leasehold interests as follows:

TO SUNSHINE MINING COMPANY, a quitclaim deed, assignment and transfer, conveying to that Company an undivided 57.14% interest in any and all ores and minerals in place in the Unit Area, and a 57.14% interest in any leasehold covering any of the Unit Area.

TO POLARIS MINING COMPANY, a quitclaim deed, assignment and transfer, conveying to that Company an undivided 33.25% interest in any and all ores and minerals in place in the Unit Area, and a 33.25% interest in any leasehold covering any of the Unit Area.

TO SILVER DOLLAR MINING COMPANY, a quitclaim deed, assignment and transfer, conveying to that Company an undivided 9.61% interest in any and all ores and minerals in place in the Unit Area, and a 9.61% interest in any leasehold covering any of the Unit Area.

1.2 IT IS MUTUALLY UNDERSTOOD AND AGREED that the sole purpose of the aforesaid conveyance or conveyances and the transfer and assignment of leasehold interests to said trustee will be to simplify the vesting in each of the parties hereto the percentage interest in any and all ore and minerals in place and leasehold interests in the Unit Area, and IT IS FURTHER MUTUALLY UNDERSTOOD AND AGREED that it is the intent of each and all of the parties hereto that the ownership of each and all of the mining claims themselves, as distinguished from the ores and the minerals in place in the Unit Area, shall remain vested as they are now vested, and shall not in anywise be affected by the execution of this agreement or by the execution of the conveyances and transfers and assignments hereinabove provided for.

ARTICLE II

DEFINITIONS

2.1 "Unit Operator" shall mean and refer to the Sunshine

Mining Company, or its successor, which is designated to carry on and conduct the united operations within the Unit Area as provided in Article IV hereof.

2.2 "Non-Operator" shall be Silver Dollar Mining Company and/or Polaris Mining Company, or the successor of either company, or any other company hereafter provided for in Paragraph 20.1.

2.3 "Unitized substances" means minerals and metals of all kinds which may be found in or produced from the Unit Area.

2.4 "Effective date" shall mean January 1, 1958.

2.5 "Costs" mean all costs and expenses incurred in the exploration, development, mining and operation of the Unit Area and milling of the ores therefrom and processing including the leaching and refining of antimony or transporting to a market the concentrates or metal therefrom pursuant to this agreement, and all other expenses that are herein made chargeable as costs, determined in accordance with the accounting procedure set forth in "Exhibit 9" attached hereto, which shall govern any and all matters covered hereby, except that in the event of inconsistencies between said accounting procedure and this agreement, this agreement shall control.

2.6 "Royalty" means the lease burdens reserved or rental to be paid to the lessor in any lease by the terms of which a party hereto has the right and privilege to mine, extract, treat and/or market any ore from any part of the Unit Area.

2.7 "Unit Area" shall include all of that property and interests described in "Exhibit 8" which is attached hereto.

2.8 "Accounting procedure" shall mean the accounting procedure set forth in "Exhibit 9" which is attached hereto.

2.9 "Exhibits". All exhibits attached hereto numbered 1 through 11 are hereby made a part of the same as if fully set forth herein.

2.10 "Facilities" means all of the facilities of the Operator at the Sunshine Mine necessary to the efficient exploration, development, mining and processing of its and/or the Non-Operators' ore and minerals. Such facilities shall include, but shall not be limited to, the Jewell Shaft, including its hoist and auxiliary equipment; all underground shafts or winzes; such drifts, crosscuts and raises as are maintained for the efficient operation of the mine; all underground equipment such as drills, steel, mucking machines, locomotives and cars, ventilation fans and pumps together with the installed pipes; track and electrical conduits necessary for their operation; the crushing plant, mill,

antimony leaching plant and refinery and any other plants or equipment necessary for processing the Operator's and/or the Non-Operators' ores and minerals; the machine shop, electrical shop, sawmill, warehouse and such other auxiliary facilities and equipment necessary to the proper supply and maintenance of operations; the accounting, assay and engineering offices; trucks, busses and loading equipment.

"Facilities" does not include the Operator's inventory of operating supplies.

2.11 "Sunshine Mine" means that mining operation of Sunshine Mining Company located on Big Creek, Shoshone County, Idaho, in Sections 14, 15, 16, 21, 22 and 23, T. 48 N., R. 3 E., B.M., and includes not only the Unit Area, as heretofore described, but also other areas outside the boundaries of the Unit Area in which Sunshine conducts operations for its own account and the accounts of others.

ARTICLE III

EFFECT OF UNITIZATION

3.1 The adoption of this plan of unitization and the execution agreement shall have the effect from and after the effective date hereof, of unitizing all further exploration, development and mining of all minerals from the Unit Area and of pooling and unitizing the production so obtained.

ARTICLE IV

GENERAL POWERS OF UNIT OPERATOR AND 500% CLAUSE

4.1 The unit operator is authorized and empowered on behalf of and for the account of all the parties hereto, to supervise, manage and conduct the orderly exploration and/or development, mining and operation of the Unit Area for the production of ores and minerals therefrom, and will in the ordinary course of its operations carry out the recommendations made by E. N. Pennebaker, Consultant Geologist, in his report dated May 1, 1957, which recommendations are attached hereto marked "Exhibit 10", provided, however, that with the prior consent of Silver Dollar and Polaris, Sunshine may modify said recommendations. Sunshine shall not undertake any major exploration and/or development work in the Unit Area other than that outlined in the aforesaid Pennebaker report, without first obtaining the consent of the other two parties hereto, and when the parties all agree upon the undertaking of such exploration and/or development work, each of the parties shall be obligated to pay its proportionate share of the cost of said exploration or development work as required by the unit

operator and in accordance with the provisions set forth herein, the same as if the said work were within the recommendations of the said Pennebaker report.

4.2 Should there not be unanimity of agreement concerning the exploration and/or development work outside that contemplated in the Pennebaker report, then any one or more of the parties hereto may nevertheless proceed with such exploration and/or development work and shall be required to employ the unit operator who shall perform such work under the following conditions: (1) the unit operator may, at its option, require a reasonable bond or other form of indemnification to assure the unit operator of payment for its services; (2) the entire cost of such exploration and/or development shall be paid by the party or parties electing so to proceed and, if there shall be two of said parties who shall elect to proceed with such project, the entire cost thereof shall be paid by said two parties in proportion to their interests as is set forth in Article VIII of this agreement; and (3) if such exploration work shall result in the discovery and development of commercial ore, the party or parties which shall have financed such exploration and/or development work shall be entitled to receive, own and withhold, subject to any and all royalties, all the ore produced as the result of such exploration and/or development work, and may sell the same for its or their own account until such time as the net profits before depletion or writeoff of such exploration and/or development work costs from the sale of such ore shall equal 500% of the amount expended by the party or parties which shall have financed such exploration and/or development work, as consideration for the risk taken by it or by them, and such net profits shall be divided between the parties who financed such exploration and/or development work in proportion to their expenditures for financing such exploration and/or development work, and thereafter any and all ore which shall be mined from the ore body thus discovered or developed shall belong to all the parties in this agreement in the proportions set forth in Article VIII of this agreement and all subsequent operating expenses applicable to such ore shall be borne by all the parties hereto in the same proportion, as provided for in Article IX (9.3) of this agreement.

Any of the parties hereto shall be permitted to call a special meeting of the other parties for the purpose of considering any proposal to do major exloration and/or development work outside that recommended by the Pennebaker report and contemplated under this paragraph, and shall give the other parties hereto twenty (20) days' written notice thereof as herein provided for, and if any party shall not agree in writing to do the same major exploration and/or development work outside that recommended by the Pennebaker report within thirty (30) days

from the date of said meeting or the final date to which said meeting was adjourned, it shall be conclusively presumed that said party does not agree to said exploration and/or development work and the 500% clause shall apply to such party with reference to such work.

ARTICLE V

OBLIGATION OF OPERATOR

5.1 The unit operator shall make a good faith effort to conduct all exloration and/or development work and/or mining in a diligent manner, in the orderly course of its operations pursuant to the terms hereof, and in accordance with generally accepted mining practices, and complying with all applicable laws, rules and regulations of Governmental agencies having jurisdiction in the premises. Operator shall secure and furnish all materials, labor and services necessary for the work herein contemplated. In the event of a scarcity of materials, labor or services in which priorities, allocations or rationing (Governmental or otherwise) shall be applicable, each non-operator agrees to furnish to Unit Operator, at cost, its proportionate part of any such material, labor and services in the event that it shall have received a quota, priority or otherwise, relating to the property and operations covered in the unit area.

5.2 Unit Operator will perform, or have performed, 480 shifts of labor per year upon or for the benefit of the American and Polaris areas, as said areas are described in the aforementioned agreement dated December 9, 1957, for as long as the Unit Operator, in its sole judgment, shall consider said areas a necessary part of the Unit Area. When in the opinion of the Unit Operator, the Polaris and American areas are no longer considered a necessary part of the Unit Area, Unit Operator may discontinue the performance of 480 shifts of labor per year upon thirty (30) days' written notice to the Non-Operators.

5.3 Unit Operator will perform $3,400 worth of work annually upon or for the benefit of the claims of the Lincoln Mining Company as described in that certain instrument of lease dated November 30, 1934, as amended August 13, 1937, between Lincoln Mining Company and Silver Dollar Mining Company, and will maintain or have maintained through the underground workings of the Unit Operator or elsewhere suitable access beneath the surface of the ground of Lincoln Mining Company's claims, as long as the Unit Operator, in its sole judgment, shall consider any portion of said Lincoln Mining Company claims to be an essential part of the Unit Area. When, in the opinion of the Unit Operator, the Lincoln Mining Company claims are no longer considered an essential part of the Unit Area, Unit

Operator may discontinue said $3,400 expenditure and the maintenance of an underground access working upon thirty (30) days' written notice to the Non-Operators.

ARTICLE VI

DECISIONS WITH REFERENCE TO OPERATION

6.1 The decisions of the unit operator made and exercised in good faith, relating to the exploration and/or development work outlined in the Pennebaker report, and mining, or the interpretation of the Pennebaker report, or any other agreed upon work, shall relieve the operator from any liability to either non-operator for any act done or omitted to be done, in good faith, in the performance of any of the provisions of this agreement. The unit operator shall have the right to suspend and/or cease exploration, and/or development work and/or mining when it, in the exercise of good faith, deems it inadvisable to continue and shall have the right to resume when in good faith it deems it advisable to do so. The decision of the unit operator made and exercised in good faith, relating to the cessation of work and/or mining and/or maintenance, or the resumption of the same, shall be final; but any party or parties shall have the right to proceed in accordance with the provisions of Paragraph 4.2 covering the 500% clause, the same as such party or parties would have with respect to the performance of work outside said Pennebaker report.

ARTICLE VII

EMPLOYEES OF UNIT OPERATOR

7.1 The number of employees of the unit operator and their selection, and the hours of labor and compensation for services performed, shall be determined by the unit operator, and the said employees shall be the employees of the unit operator.

ARTICLE VIII

OWNERSHIP OF MINERALS AND ORES PRODUCED

8.1 Unitized substances mined and produced from the unit area shall belong to the parties in the following proportions, after the payment of any royalty due thereon:

Sunshine	57.14%
Polaris	33.25%
Silver Dollar	9.61%

8.2 Each party hereto shall own its proportionate share in the unitized substances produced hereunder and shall always have the right and privilege of receiving in kind and of separately

marketing its proportionate share of such production, and receiving the proceeds therefrom. Any extra costs or expenses incurred by delivery in kind or separate disposition of any party's share of such production shall be borne by such party.

8.3 In the absence of instructions to the contrary, unit operator shall, on its own behalf and as agent for each of the other parties hereto, market the entire production from said unit area and after payment of any and all royalties due thereon shall divide the proceeds therefrom, within ten (10) days after receipt by unit operator thereof, to each of the parties in proportion to the ownership of the minerals and ores produced as set forth in Article VIII of this agreement. If at any time any one of the other parties to this agreement shall elect to market its share of said unitized substances, it shall give unit operator at least six (6) months' written notice prior to the termination of any smelter contract previously entered into by unit operator of its said election so that unit operator will not obligate itself to deliver a quantity of unitized substances under any contract with any purchaser which, by reason of such election upon the part of any of said other parties, the unit operator would be unable to deliver; it being understood and agreed by the parties hereto that unit operator will not enter into any marketing contract with respect to any of said unitized substances other than its own share thereof for any period in excess of one year, it being understood and agreed, however, that unit perator may renew any such marketing contract from year to year unless unit operator shall at least six (6) months prior to the expiration of such contract have received written instructions to the contrary from each party who shall desire to market its own share of said unitized substances. It is further understood and agreed that each party so electing to market its share of said unitized substances shall make prompt payment of any royalties due thereon to unit operator, and unit operator agrees that it wjll include any amounts so received with its own remittance to royalty holders. IT IS ALSO UNDERSTOOD AND AGREED that if Polaris or Silver Dollar shall elect to market its share of the unitized substances derived from ore mined from said unitized area such party so electing to market its share of said unitized substances shall promptly furnish to each other party a true copy of its settlement sheets. Adjustments shall be made quarterly or at such other intervals as may be agreed upon between the party or parties which shall have been marketing its or their share of said unitized substances and the party or parties whose share of said unitized substances shall have been marketed by Sunshine in order to properly apportion the amount of unitized substances and metallic content thereof, based upon weights and grade, which

shall have been marketed by or on behalf of all of the parties hereto during the preceding quarterly period.

8.4 When a non-operator is indebted to the unit operator for any sums due by virtue of the terms of this agreement, the unit operator shall have the full right and privilege of withholding all proceeds accruing from the sale of that non-operator's portion of the production from the property subject hereto, until such time as the unit operator has been fully reimbursed for any and all such sums, and a copy of this provision, together with a statement of such indebtedness, when transmitted to a purchaser shall be considered sufficient notice to any purchaser of the production from the unit area under such circumstances to make payments directly to the unit operator accordingly.

8.5 All ores and minerals produced from the unit area will be kept separate and apart from any other production of the unit operator from areas other than the unit area and weighed and sampled separately from such other production. If any party to this agreement has not elected under subsection 8.3 of this Article, to take in kind its share of the crude ore production from the unit area, then its share of such production shall remain with other ore in the unit area and may be commingled with production from other areas, after the ore from the other areas has been weighed and sampled. Ores from any area within the unit area where lease burdens are due shall be measured and sampled before commingling with other ores from the unit area, and adequate records shall be kept so that royalty payments can be made to the lessor of such areas.

8.6 In order for each party hereto to record for its own account the division of ores and metals contained therein which are produced from said unit area and which are to be divided in accordance with paragraph 8.1 above, the unit operator hereby agrees to furnish within thirty (30) days after the end of each calendar month in which any ores shall have been produced, a written statement showing the total tons of ore produced from the unit area together with assays and other data relative to the metallic content thereof; and shall also furnish a written statement summarizing shipments of ore, concentrates or other forms of metallic production which have been marketed by any of the parties hereto during such preceding calendar month and the proceeds therefrom and the amount of production subject to royalty; and it is mutually agreed that, as the unit operator, Sunshine will adjust the division of metallics contained in all production as provided for in paragraph 8.3 above.

8.7 All sampling, weighing and engineering data of the unit operator insofar as they may relate to the exploration and/or development, mining and operation of the Unit Area, and such

other sampling, weighing and engineering data of the unit operator relating to production from other than the Unit Area insofar as they may relate to proper distribution of production to the parties, shall be open for inspection of each non-operator, or its duly authorized representatives, at reasonable times and at the unit operator's customary place of business.

ARTICLE IX

BOOKS OF ACCOUNT

SHARING OF COSTS, EXPENSES, ADVANCE DEPOSITS & TAXES

9.1 The unit operator shall keep proper books of account showing a true and accurate record of all costs and expenses incurred in the operation herein contemplated, and in accordance with the provisions therefor set forth in the accounting procedure, as contained in "Exhibit 9" attached hereto. The expenses chargeable shall not necessarily be limited to the items of expense referred to in the accounting procedure, but shall include all those reasonably necessary or usable for the ordinary and efficient exloration, development, mining and operation of the unit area, but any provisions of the accounting procedure which shall be in conflict with the express provisions of this agreement, shall be controlled by such express provisions.

9.2 It is expressly understood and agreed that no charge for the use of facilities owned by the unit operator is to be made or included in any expenses charged to the unit area.

9.3 Except as herein otherwise specifically provided, the costs and expenses incurred in the exploration and/or development, mining and operation of the unit area shall be borne by the parties hereto as follows:

Sunshine	57.14%
Polaris	33.25%
Silver Dollar	9.61%

9.4 Unit Operator shall promptly pay and discharge all costs and expenses incurred in the exploration and/or development, mining and operation of the unit area, pursuant to this agreement, and shall charge each party hereto with its respective proportionate share in the manner provided in the accounting procedure at "Exhibit 9" above referred to.

Before the end of the calendar month following the calendar month in which any operations shall have been conducted under this agreement, unit operator shall furnish to each non-operator a billing and statements showing in detail all the direct costs and expenses incurred by unit operator in its said operations of the unit area during the calendar month preceding the report,

together with a record showing the number of direct shifts worked within the Sunshine mine and within the unit area, and also accompanied by an analysis in writing of the total indirect costs and expenses of the Sunshine mine, part of which were apportioned to the unit area in accordance with the accounting procedure described in said "Exhibit 9", and all statements related to billings shall contain sufficient detail satisfactory to non-operators. Each non-operator shall pay unit operator on or before ten (10) days following receipt of such billing and statements; it being understood, however, that payment of any such bills shall not prejudice the right of any non-operator to protest or question the correctness thereof. Except for corrections resulting from an audit or examination of unit operator's records as provided for at paragraph 9.5 below, all billings and statements shall be presumed to be true and correct and shall not thereafter be questioned, unless any non-operator makes written exception thereto to unit operator within sixty (60) days after receipt of said billing or of said statements.

9.5 The books and records of the unit operator insofar as they may relate to the exploration and/or development, mining and operation of the unit area and of the Sunshine mine, shall be open to the inspection of each non-operator, or its duly authorized representatives, at reasonable times and at the unit operator's customary place of business. A non-operator, at reasonable times and at its own expense, may make or have made audits of the records of production, costs and expenses in connection with the operation of the unit area.

9.6 Unit operator, at its election, may require of each non-operator an advance deposit for its proportionate share of anticipated cash expenditures, by furnishing each non-operator with an estimate of such cash required to cover operations in the unit area for a period not in excess of a calendar month, which advance deposit shall not exceed one-twelfth of the non-operator's proportionate share of the costs and expenses incurred by it in the previous calendar year in the exploration and/or development, mining and operation within the unit area. Within ten (10) days after receipt of such estimate, non-operator shall pay its proportionate share thereof. Such advance amount, which shall be adjusted from year to year, may be required by the unit operator to be maintained until there is a termination of this agreement.

9.7 In case the unit operator shall elect to require advance deposits, as provided under subsection 9.6 of this Article, nevertheless current bills shall be sent to each non-operator and shall be paid for within ten (10) days from receipt of billing, and the advance deposit shall not be applied against a current bill

unless the unit operator so elects to do so when the current bill becomes past due, that is, after ten (10) days after receipt of billing. In the event the unit operator applies the advance deposit or a portion thereof to amounts in arrears, it may request immediate restitution by the non-operator of its proportionate part of this advance deposit fund.

9.8 In the event that the non-operator has not elected to take delivery of its proportion of the unitized substances, then the unit operator unless notified in writing to the contrary by non-operator may, but shall not be obliged to, deduct from a non-operator's returns from the sale of its share of unitized substances, that non-operator's share of the cost and expenditures for operations theretofore accrued, and remit any balance due the non-operator.

9.9 Any sum to be paid hereunder to unit operator by non-operator shall draw interest at six per cent (6%) per annum from a date thirty (30) days after receipt of billing, until paid.

9.10 Each party hereto agrees to pay before delinquency any and all taxes or other assessments validly assessed against its proportionate interest in the unit area, and the unit operator agrees to pay before delinquency any and all taxes or other assessments levied against its machinery, equipment and other facilities. Each party hereto shall pay any property tax based on net profits, or any mine license tax attributable to its proportion of production from the unit area, which same shall be paid before delinquency. Deductions claimed for depletion of ore reserves in computing any license or State or Federal income taxes shall be based by each party upon its own proportion of unitized substances produced from the unit area. In the event that any party fails to pay any of such tax, other than Federal or State income tax, either or both of the other parties may do so, but shall not be obliged to do so, but if it or they shall do so then the party failing to pay such taxes shall, upon demand, repay the party/ies having paid the tax, the amount of the tax plus any penalty and/or interest, plus interest from the date of payment at eight per cent (8%) per annum; and should action be necessary to enforce said obligation, the party owning such obligation shall pay to the party enforcing same reasonable attorney's fees in addition to court costs in connection therewith. Each party hereto is solely responsible for any income tax, Federal or State, due from it. Any party may, at its own expense, protest and prosecute to final determination any tax assessment it considers unreasonable.

ARTICLE X

INDEMNITY OF NON-OPERATOR

10.1 The unit operator shall hold each non-operator harmless from any lien or encumbrance on its interest in the unit area and on all ores or minerals mined and produced therefrom by reason of the failure of the unit operator to pay any claims, obligations and charges which should have been paid thereunder by the unit operator and for which the non-operator has theretofore paid its proportion to the unit operator.

ARTICLE XI

LIEN OF UNIT OPERATOR

11.1 Unit Operator is hereby given a first and preferred lien on each party's interest in the unit area and the unitized substances produced therefrom to secure the payment of all delinquent sums due from each such party to the unit operator that arise from operation of the unit area.

11.2 In the event any party fails to pay any amount owing by it to the unit operator as its share of such costs and expenses or such advance estimate, within the time limited for payment thereof, unit operator, without prejudice to and irrespective of other existing remedies or provisions set forth herein or remedies provided by law, is authorized, at its election, to collect from the purchaser or purchasers of unitized substances, the proceeds accruing to the interest in the unit area of the delinquent party up to the amount owing by such party, and each purchaser of unitized substances is authorized to rely upon unit operator's statement as to the amount owing by such party, or the unit operator, at its election, shall have the right to withhold said non-operator's share of unitized substances, and sell the same, until such time as said delinquent sum or sums shall have been paid in full by the application of the net smelter returns or any other payment, less the non-operator's proportionate share of all costs and expenses including royalty incurred by operator in the mining, milling and marketing of such unitized substances.

11.3 In the event of neglect or failure of any non-operator to pay promptly its proportionate part of the cost and expense when due, the other non-operator may at its option along with the unit operator, within thirty (30) days after the rendition of statement therefor by unit operator, contribute its proportionate share to the payment of such delinquent indebtedness, and the non-operator so contributing shall be entitled to the same lien rights as are granted to unit operator in this section. Upon the payment by such delinquent non-operator to unit operator of any amount or amounts on such delinquent indebtedness, or upon any

recovery under the lien conferred above, the amount or amounts so paid or recovered, including interest, shall be distributed and paid to the contributing non-operator and unit operator proportionately in accordance with the contributions theretofore made by them.

11.4 If a party fails to pay its share of costs and expenses for a period of three (3) months, the operator may at its option at any time thereafter give written notice and make demand for payment of such delinquencies, and if such payment is not made within thirty (30) days after receipt of such notice and demand, then such failure to pay shall constitute grounds for a demand to the delinquent non-operator to withdraw from the operation.

The delinquent non-operator, having failed to comply with the request for the payment of money due and the demand for its withdrawal having been made, agrees to voluntarily withdraw from the unit operation and unit area, and take no further part therein; in which event such withdrawal shall be as of the beginning of the period of the delinquency, the same as though notice of withdrawal in writing had been made at the beginning of such period. Upon withdrawal (subject to the right to collect the net value of any and all ore reserves as provided herein), the withdrawing party agrees to deed and transfer its entire right, title and interest in and to this agreement and the unit area to the other parties in the same manner and form as set forth in paragraph 23.2 of this agreement.

In the event any party hereto withdraws from the unit operation and the unit area, as herein provided, the net value of the withdrawing party's share of any ore reserves in the unit area shall be considered in adjusting the settlement with the said withdrawing party. A disinterested mining engineer shall, at the request of the operator, estimate the proven ore reserves and the net value of the same in place at the time of the effective date of the withdrawal. Thereafter the said net value of the withdrawing party's share of proven ore reserves shall be divided in half, and the charges and expenses owing hereunder by the withdrawing party to the operator shall be deducted from one-half of the aforesaid net value, and the remainder, if any, of the net value of that said one-half shall constitute the amount which shall be paid to the withdrawing party for its entire interest. This remainder shall be paid to the withdrawing party if, as, and when the said ore reserves are mined, milled and marketed. The said remainder shall be paid at a rate per ton determined by dividing the same remainder amount by the number of tons of ore reserves. The transfer and deeding by the withdrawing party shall be to the remaining parties in the proportion that they contributed to the payment of the withdrawing party as in paragraph 11.3 provided, and if the party other than the operator has not contributed to the

payment of the said delinquent indebtedness, then the transfer and deeding shall be to the operator.

After the aforesaid written notice of withdrawal and transfer and deeding of all interest in this agreement and the property comprising the unit area, no additional liability shall accrue against the party withdrawing and such party shall not be liable for the payment of any costs or expenses after the withdrawal.

11.5 It is not intended that the foregoing remedies shall be exclusive. The operator and also the non-operators shall also have all the remedies provided by law or equity.

ARTICLE XII

ROYALTY OR RENTAL SETTLEMENT

12.1 All royalties or rentals due arising out of any production from any part of the unit area shall be paid by the unit operator out of each party's proportionate share of any production upon which royalty or rental is due.

ARTICLE XIII

OWNERSHIP OF PLANT AND EQUIPMENT

13.1 Notwithstanding any other provisions herein, the unit operator shall have the sole and exclusive ownership of all the mining plant, equipment and other facilities used or located within or on the unit area, including, but not by way of limitation, all buildings, machinery, equipment, trucks, supplies and facilties of every kind and nature.

13.2 Should any trucks, machinery or equipment be disposed of during the course of operations under this agreement, the proceeds received therefor by the unit operator shall be treated as a credit upon the costs of operations in accordance with the percentages set forth in paragraph 8.1 hereof, after allowance for any proportionate part which must be credited to other parties which have shared in the cost of such equipment disposed of. If there is a cessation in operations, each party shall be the owner of its proportionate share of all machinery, trucks, and equipment purchased within three (3) years prior to such cessation under this agreement.

ARTICLE XIV

CONSULTATIONS AND MEETINGS

14.1 Unit operator shall consult with non-operators from time to time so that matters of policy may be mutually agreed upon for the best interests of all. In the absence of mutual agreement and also in emergency matters the decision of the unit

operator, exercised in good faith, shall be final except as to the action otherwise provided by this agreement. Unit operator shall never be liable to non-operators for any act done or omitted to be done in good faith in the performance of any of the provisions of this agreement.

Any party to this agreement shall have a right to call meetings at any time, provided, however, that except as provided in paragraph 4.2 at least ten (10) days advance notice of such meeting shall be given to each of the other parties.

ARTICLE XV

LIABILITY FOR DAMAGES

15.1 If the operations conducted pursuant to this agreement result in liability for damages to the unit operator and/or the other parties hereto, it is understood and agreed between the parties that in the absence of proof of negligence, willful misconduct, or bad faith by the unit operator, each party shall be responsible for its share thereof. It is understood and agreed that the unit operator shall at all times that this agreement is in force and effect, carry sufficient insurance protection to replace insurable facilities which may be lost by fire during its operations, it being the intent of this agreement that Sunshine, as the unit operator, is obligated to maintain sufficient facilities and to continue operations so long as it is mutually profitable to do so; and it is also expressly understood that the unit operator will also carry insurance against the reasonable hazards arising from other liabilities connected with its operations as the Sunshine mine, as set forth in the schedule marked "Exhibit 11" attached hereto. The cost of all insurance coverage connected with the Sunshine mine operations shall be included in the indirect costs as defined under "Exhibit 9" attached hereto. Any payments received by unit operator as a result of insurance claims arising from losses affecting operations under this agreement shall be used to replace and repair facilities thus damaged, and any deficiency or excess of such proceeds as compared with the cost of such replacement or repairs, shall be treated as a charge or credit, as the case may be, to operating costs which are chargeable to Sunshine mine operations.

15.2 Any public liability insurance shall name the non-operators and Sunshine as assured.

ARTICLE XVI

RIGHT OF ACCESS

16.1 A non-operator shall have access at all reasonable times to all operations in the unit area for purpose of inspection, but shall not interfere with the operations.

ARTICLE XVII

RIGHTS OF TUNNELING, INGRESS AND EGRESS

17.1 Each of the non-operators hereby grants unto the unit operator the right without limitation, of tunneling in any of the unit area, the right of ingress and egress within the said unit area, and the right to make use of the surface of the said unit area in any manner it deems advisable in connection with the operation of the unit area.

ARTICLE XVIII

NOT A PARTNERSHIP

18.1 The liability of the parties to third persons shall be several and not joint, and this agreement shall not be construed under any circumstances as creating a partnership. Each party shall be responsible only for its proportionate share of the obligations as herein set out and shall be liable only for its proportionate share of the cost of exploration and/or development, mining and operation of said property, as herein set forth.

ARTICLE XIX

ELECTION UNDER INTERNAL REVENUE CODE OF 1954

19.1 Insofar as applicable to the parties hereto, each of such parties agrees to and does hereby elect to be excluded from the application of Sub-Chapter "K" of Chapter 1 of Sub-Title A of the Internal Revenue Code of 1954, or such part thereof as may be permitted or authorized by the Secretary of the Treasury of the United States or his delegates. Unit operator is hereby instructed to file the election to be excluded from said Sub-Chapter "K" attached to a partnership return and a copy of this agreement, as more specifically provided in Regulation Section 1.761 (iv) promulgated under Section 761 of the Internal Revenue Code of 1954.

ARTICLE XX

ENLARGEMENT OF UNIT

20.1 By the mutual agreement of the parties hereto, the unit area may be increased and enlarged upon such terms as are acceptable to all of the parties hereto.

ARTICLE XXI

SUCCESSOR UNIT OPERATOR

21.1 Should the unit operator transfer or assign its entire interest as provided in Article XXII, then its transferee, assignee or successor shall be the unit operator under this agreement.

ARTICLE XXII

ASSIGNMENT AND PREFERENTIAL RIGHT

22.1 Any party hereto may assign, transfer or convey its entire interest in this agreement in the unit area to a successor to all or substantially all of its business and assets, or to a corporation which is its parent, or to a subsidiary, or to a subsididary of its parent corporation, provided that,

(a) the assignee, if a corporation, is registered and licensed to do business in the State of Idaho;

(b) the assignee in writing agrees to perform and be bound by all of the assigning party's obligations under this agreement;

provided, however, that any party so assigning its interest in this agreement and in the unit area shall remain fully responsible for the performance of its obligations under this agreement, to the same extent as if such assignment or transfer had not been made; it being intended that in such event the assigning party shall remain a primary obligor and shall be primarily responsible for the performance of said obligations and shall not be limited to those of a guarantor. In such event, however, the remaining parties hereto may release and discharge the assigning party and may agree to accept the assignee in place of the said assignor and discharge the same assignor from any further obligations hereunder, but the same shall be done only in writing, executed by all of the parties hereto and the assignee.

IT IS MUTUALLY UNDERSTOOD that there is a possibility that at some time during the life of this agreement Polaris may be merged into Hecla Mining Company, a Washington corporation which is qualified to do business in Idaho, and it is further mutually understood that in the event of such merger the corporate existence of Polaris would become extinguished and all property and property rights of Polaris would become automatically vested in Hecla and all debts and contract obligations of Polaris would automatically become the debts and obligations of Hecla. It is therefore mutually understood and agreed that notwithstanding the foregoing provisions of Article XXII, Hecla Mining Company shall, in the event of such merger, automatically become a party to this agreement in the place and stead of Polaris and shall automatically become entitled to all of the rights and privileges which could have been enjoyed and exercised by Polaris and shall automatically assume all of the duties and obligations of Polaris under the terms of this agreement.

22.2 A party hereto may not assign, transfer or convey part of its interest under this agreement and/or in the unit area.

22.3 Any party hereto may assign, transfer or convey its entire interest in this agreement and the unit area to someone other than those specified in Article XXII, Sub-paragraph 22.1, but first such party shall give the other parties hereto written notice thereof, stating the price at which and the terms on which sale thereof is proposed to be made. Thereupon the other parties hereto shall have the right and option to purchase the interest to be sold, for the price and on the terms stated in the notice given by the selling party, provided written notice of election to exercise such option is given to the selling party within thirty (30) days after the receiving of the selling party's notice of the desire to sell. The other two parties to this agreement shall have the right to purchase in proportion to their respective ownerships in the unit area, and should either party desire not to so purchase, then the other party shall be entitled to purchase the entire interest proposed to be sold. Among such two parties, failure to give the other of the two parties notice of desire to exercise the option given by the selling party within fifteen (15) days after receiving the selling party's notice of desire to sell, shall constitute the said party's refusal to participate in the purchase, and the remaining party then shall be entitled to purchase the entire interest of the selling party.

22.4 If said option shall be exercised, the selling party shall sell, transfer and convey its entire interest in this agreement and the unit area to the party or parties purchasing the same, upon payment of said price in accordance with the terms submitted by the selling party. Upon payment for the selling party's interest, selling party shall furnish valid instrument transferring and conveying the interest in this agreement and the unit area from the seller to the buyer or buyers.

22.5 Should both the other parties hereto elect not to purchase the interest of the selling party, the selling party shall have the right to sell, transfer and convey its interest in and to this agreement and in and to the unit area, to any other purchaser, provided that,

(a) sale thereof is consummated within ninety (90) days of the giving of the initial notice of the desire to sell as above provided for; and
(b) sale thereof is made at the same price and on the same terms stated in such initial notice; and
(c) the other party or parties hereto have in writing approved the purchaser as being financially able to perform its obligations arising hereunder, which said approval shall not be unreasonably withheld; and

(d) the purchaser in writing assumes and agrees to perform all the obligations of the selling party under this agreement, and agrees that its interest in the unit area shall be committed to and be bound by the terms of this agreement.

22.6 No assignment or transfer herein permitted shall be binding upon the unit operator until the first day of the calendar month after unit operator is furnished with an original, photostatic, or certified copy/ies of the instrument/s of transfer.

ARTICLE XXIII

CESSATIONS OF OPERATIONS — WITHDRAWAL

23.1 In the event of the cessation of operations but not abandonment under this agreement, there will be considerable expense to maintain the property, and until it is abandoned each non-operator shall pay to the unit operator its proportionate share of the cost for the maintenance and upkeep of the unit area in the same proportion as set forth in Article IX, Sub-paragraph 9.3.

23.2 Should a party desire to withdraw from the operation of the unit area and from this agreement, then it may do so by giving ten (10) days' written notice thereof to the other parties and validly transferring and deeding all right in this agreement and all interest in the unit area property to the other parties, and each transfer shall be in proportion to the other party's then existing ownership in the unit area, and thereafter the costs and expenses shall be borne in the new proportion of ownership resulting therefrom. Such withdrawal shall not have any effect on accrued obligations of the withdrawing party to any other party under this agreement.

ARTICLE XXIV

TERMINATION

24.1 This agreement shall remain in full force and effect for a period of fifty (50) years from the effective date of this agreement.

24.2 It is further understood and agreed that notwithstanding the termination of this agreement mutually agreed upon, ownership of ores and minerals in place in the unit area shall be the same as it was immediately prior to such termination.

ARTICLE XXV

CONSERVATION

25.1 Operations hereunder and the mining and the

development of the unit area shall be conducted by the unit operator to provide for the economical and efficient recovery of said minerals without waste.

ARTICLE XXVI

FORCE MAJEURE

26.1 Obligations of each party hereto, except the obligation to make payment of money due hereunder, shall be suspended while, but only so long as, such party is prevented from complying with such obligations, in part or in whole, by strikes, lockouts, acts of God, the public enemy, unavoidable accidents, uncontrollable delays in transportation, inability to obtain necessary materials in open market, governmental laws, rules, regulations or orders, or any other cause beyond the reasonable control of such party, whether similar to the matters herein specifically enumerated or not; provided, that no party hereto shall be required against its will to adjust any labor dispute.

ARTICLE XXVII

TITLE

27.1 Each party hereto represents that it is the owner or lessee as shown in Article I, and can validly make the deed, transfer or assignment as set forth in Article I hereof, and each party agrees to indemnify and hold harmless all the other parties against any and all claims arising out of the fact that the said party is not the owner or lessee of the interest and the rights claimed by such party as set forth in Article I hereof, free from encumbrance.

27.2 In addition to the obligations of the unit operator set forth in Paragraphs 5.2 and 5.3 of this agreement, Silver Dollar Mining Company will do every other thing necessary to maintain its leases from Lincoln Mining Company and Hayden Hill Consolidated Mining Co. in such force and effect as necessary to preserve the right to mine the ore in the Rotbart, and/or American and Polaris areas as determined by the unit operator as long as the unit operator shall consider the Lincoln Mining Company claims and/or the American Polaris areas essential parts of the unit area. Should the unit operator deem it necessary to make expenditures other than those called for in Paragraphs 5.2 and 5.3 in order to prevent or remedy a default by Silver Dollar under the terms of the aforementioned leases, it may do so for the account of Silver Dollar, and Silver Dollar agrees to pay Sunshine therefor upon demand, and agrees that Sunshine may treat the same in the manner provided in Paragraph XI hereof as if it were a portion of Silver Dollar's share of costs and expenses.

ARTICLE XXVIII

COVENANT RUNNING WITH THE LAND

28.1 This agreement and amendments hereto, if any, shall be deemed a covenant running with the lands, leases and properties embraced within the unit area, and the same shall be subject to all charges herein provided for, and all the terms hereof.

ARTICLE XXIX

NOTICES

29.1 Any notices referred to in this agreement shall be in writing and shall be deemed to have been sufficiently given within twenty-four (24) hours after mailing of such notice by fully prepaid registered letter or transmitting by telegram, addressed, in the case of Sunshine Mining Company to 738 Peyton Building, Spokane 1, Washington, in the case of Silver Dollar Mining Company to West 909 Sprague Avenue, Spokane, Washington, and in the case of Polaris Mining Company to Wallace, Idaho. Any party may change the address herein set forth by notice to the others in writing.

ARTICLE XXX

OBLIGATION OF SUCCESSORS AND ASSIGNS

30.1 This agreement shall be binding upon the succesors and assigns of the parties hereto.

EXECUTED by the parties hereto as of the day and year first above written.

ATTEST:

SILVER DOLLAR MINING COMPANY

_____ By _____

Secretary *President*

ATTEST:

POLARIS MINING CO.

_____ By _____

Secretary *President*

ATTEST:

SUNSHINE MINING CO.

_____ By _____

Secretary *President*

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

On this 9th day of October, 1958, before me, a Notary Public in and for the above named County and State, personally appeared Elmer E. Johnston and W. I Anderson, to me known to be the President and Secretary, respectively, of SILVER DOLLAR MINING COMPANY the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and each on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

NOTARY PUBLIC for the State of Washington, residing at Spokane.

My commission expires September 7, 1960

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

On this 9th day of October, 1958, before me, a Notary Public in and for the above named County and State, personally appeared L. J. Randall and John R. Matthews, to me known to be the President and Secretary, respectively, of POLARIS MINING COMPANY, the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and each on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

NOTARY PUBLIC for the State of Washington, residing at Spokane.

My commission expires September 7, 1960

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

On this 9th day of October, 1958, before me, a Notary Public in and for the above named County and State, personally appeared Robert M. Hardy, Jr. and Stanton B. Bennett, to me known to be the President and Secretary, respectively, of SUNSHINE MINING COMPANY, the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and each on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

NOTARY PUBLIC for the State of Washington, residing at Spokane.

My commission expires September 7, 1960

APPENDIX B

72-210. Employer's failure to insure liability. — If an employer fails to secure payment of compensation as required by this act, an injured employee, or one contracting an occupational disease, or his dependents or legal representative in case death results from the injury or disease, may claim compensation under this law and shall be awarded, in addition to compensation, an amount equal to ten per cent (10%) of the total amount of his compensation together with costs, if any, and reasonable attorney's fees if he has retained counsel.